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Honorable George C. Pratt:

Shifting gears here, I would like to turn our attention to municipal liability. We will hear first from Professor Karen Blum. Karen is a professor from Suffolk University Law School in Boston. Karen.

Professor Karen Blum:

Judge, good afternoon. This presentation will briefly touch on the four methods of establishing municipal liability under Section 1983 that have been recognized by the courts.

The first two methods are relatively untroublesome. In the first circumstance, the plaintiff asserts that an officially adopted rule, regulation, or policy (usually it is a written rule or policy) is unconstitutional. It is settled that the first application of that policy can be attributed to the municipality for liability purposes under Section 1983. This is exemplified by the *Monell*[1] case, where the Department of Social Services and the Board of Education in New York had a written, formal policy requiring pregnant employees to stop working at a certain time, even if it was not medically necessary.[2] That policy was found to be unconstitutional and the City could be held liable for that official policy.[3]

There are a number of cases, especially in the Seventh Circuit, which have held that a local government's mere enforcement of State law as opposed to incorporation or adoption of State law into local regulations or codes, is not sufficient to establish *Monell* liability.[4] Thus, there are some cases where the local officials will

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[1] *See generally* Monell v. Dep't of Social Services of the City of New York, 436 U.S. 658 (1978).

[2] *Id.* at 658.

[3] *Id.* at 693.

[4] *See* Surplus Store and Exchange, Inc. v. City of Delphi, 928 F.2d 788, 793 (7th Cir. 1991); Thompson v. Duke, 1987 WL 33188, at *5-6 (N.D. Ill.

come in and say, "All we are doing is merely enforcing a State law that we are required to enforce."[5]

A recent case along the same lines out of the Seventh Circuit is *Bethesda Lutheran Homes and Services v. Leean.*[6] The Seventh Circuit makes the point that when the municipality is acting under compulsion of state or federal law, it is the policy contained in that law, rather than anything devised or adopted by the municipality, that is responsible for the injury.[7] In such cases, the courts will generally say that the state of mind of the local officials who enforce or comply with the state or federal regulations is immaterial on the question of whether the local government is violating the Constitution, if the local officials could not act otherwise without violating the state or federal law. This would make an effective argument for a practitioner who is defending a local entity where this kind of situation exists, but one must be careful.

In a case out of the Eleventh Circuit,[8] defendants argued that they were merely enforcing a state court injunction. Therefore, since it was State law and not local law, the county or city should not be held responsible. What the local officials were doing was enforcing a state court injunction that prohibited certain anti-abortion protesters from being within the "buffer zone."[9] The court said that these local officials went beyond enforcing the terms of the state court injunction.[10] In fact, what they did was arrest all of the anti-abortion protesters found within this "buffer zone," including persons not named in the injunction.[11] So, when one goes beyond or in some way adapts or modifies the state law injunction, rule, or whatever it may be, it then becomes one's own policy.

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aff'd, 882 F.2d 1180 (7th Cir. 1989) (holding that a county's incarceration of a parolee without making independent finding as to validity of his incarceration could not provide a basis for Section 1983 liability where the county acted according to its duties under state law and had no duty or authority to determine the validity of the parolee's confinement).

[5] *See, e.g., Surplus Store*, 928 F.2d at 793.

[6] 154 F.3d 716 (7th Cir. 1998).

[7] *Id.* at 718.

[8] *See, e.g.*, McKusick v. City of Mellbourne, 96 F.3d 478 (11th Cir. 1996).

[9] *Id.* at 481.

[10] *Id.* at 484.

[11] *Id.*

City officials met with a similar fate on remand in *Garner v. Memphis Police Department*,[12] a case that went to the Supreme Court on the use of deadly force.[13] *Garner* involved a state statute that authorized the shooting of fleeing felons.[14] When the case returned to the Sixth Circuit, the only defendant left in the suit was the City of Memphis. Since the law regarding the shooting of fleeing felons had not been clearly established at the time, the individual police officers successfully escaped liability on qualified immunity grounds. The State was protected by the Eleventh Amendment.

The City argued that this was a state statute authorizing the shooting of fleeing felons.[15] Thus, it was not the City's policy but the State's policy, and the City should not be liable.[16] The court disagreed, finding that the City made a conscious choice to adopt and adapt the state policy.[17] In fact, the City's policy was more restrictive than the State's policy.[18] The State allowed the shooting of any fleeing felon.[19] The City only allowed the shooting of certain fleeing felons, but unfortunately for the City, an unarmed fleeing burglar happened to be in this category.[20] As a result, it became the City's policy.[21]

Another case *Caminero v. Rand*[22] presents a detailed discussion of the distinction between cases in which the City is merely enforcing state law, as opposed to cases where the City has somehow adopted, incorporated, or made that law its own policy.[23]

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[12] 8 F.3d 358 (6th Cir. 1993).

[13] Tennessee v. Garner, 471 U.S. 1 (1985).

[14] *Id.* at 4.

[15] *Garner*, 8 F.3d at 360. A Tennessee statute provided that "[i]f, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest." TENN.CODE ANN. § 40-7-108 (1982).

[16] *Id.*

[17] *Id.* at 364.

[18] *Id.* at 360.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 364.

[22] 882 F. Supp. 1319 (S.D.N.Y. 1995).

[23] *Id.* at 1324.

Where there is no written or officially adopted rule, regulation, or policy, a second method of establishing municipal liability is to point to an unconstitutional custom or practice that has the force of law. These cases assume that the policy makers are on actual or constructive notice of this practice or custom. If the practice or custom is unconstitutional, then the City itself should be held responsible under Section 1983 for the resulting constitutional violations.

A case in this category that involves jail strip searches is *Gary v. Sheahan.*[24] In *Gary*, there was a custom of routinely strip searching women in the receiving room upon returning from court.[25] However, men were not routinely subjected to such searches.[26] The reason for this disparity was simply because there were so many male prisoners as opposed to relatively fewer female prisoners. Moreover, the prison did not have the staff nor the facility to perform searches on the male prisoners.[27] Therefore, the prison developed the custom or practice of routinely searching the women who came back from court, but not the men.[28] The fact that such a policy is not a written policy, or indeed conflicts with a written statement of policy, does not defeat the plaintiff's claim that such a policy existed.[29] In other words, the City will not protect itself by having something in writing that says "this is our policy", if in fact the custom or practice is quite to the contrary.

Similarly, in *Thomas v. District of Columbia,*[30] the defendants argued that there was no practice or custom of permitting sexual harassment or assault, because the District had a rule expressly prohibiting intimate relations between prison guards and inmates.[31] However, according to the court, the fact that the District had a rule that prohibited the conduct did not relieve the District of liability

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[24] No. 96 C 7294, 1998 WL 547116 (N.D. Ill. August 20, 1998) (not reported).

[25] *Id.* at *1.

[26] *Id.* at *2.

[27] *Id.*

[28] *Id.*

[29] *Id.* at *5.

[30] 887 F. Supp. 1 (D.D.C. 1995).

[31] *Id.* at 5.

where such a pattern of violations existed.[32] The pattern of violations would in fact be the practice or custom, if the plaintiff proves such a pattern.[33]

The third method of establishing local government liability is somewhat more troublesome. This method, as established in *City of Canton v. Harris*,[34] is based on a failure to train, supervise, or discipline. Under *City of Canton*, the liability of the City is derivative and involves a situation where there has been an underlying constitutional violation by a non-policy-making employee,[35] such as a constitutional violation committed by the officer on the street.[36] The question becomes whether the City can be held liable under Section 1983 for the underlying constitutional violation that has been committed.

In *City of Canton*, the Supreme Court held that a city (city, county, or any local government entity) can be held liable under Section 1983 where the policy is not itself unconstitutional, but where the City can be shown to be deliberately indifferent to the likelihood that non-policy making employees are going to commit constitutional violations.[37] In other words, the policy that the plaintiff points to is a failure to train, some kind of inadequate training, or failure to discipline or supervise. Since this, in itself, may not be unconstitutional, the plaintiff must link that policy to the underlying constitutional violation that has been committed by the officer.[38]

That is the challenge that is presented in the *City of Canton* genre of cases, and the Supreme Court has said that the causal link can be made by establishing that the City was "deliberately indifferent" to the likelihood that these constitutional violations would occur.[39] *City of Canton* refers to objective deliberate indifference, that the policy makers knew or should have known that by failing to train in this

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[32] *Id.*
[33] *Id.* at 6.
[34] 489 U.S. 378 (1989).
[35] *Id.* at 389.
[36] *Id.*
[37] *Id.* at 388.
[38] *Id.* at 391.
[39] *Id.*

area or by failing to supervise or discipline, the constitutional violation was going to be the consequence.[40] How does a plaintiff show deliberate indifference under *City of Canton*? There are two methods that the courts have mentioned.

One method is the "obviousness" approach, where the plaintiff points to an area in which it is immediately obvious that training is necessary. If the appropriate training is not given, a constitutional problem is inevitable and a constitutional violation will result. For example, if police officers are given guns and they have the power to arrest felons, then they should be given some training on the constitutional limits on the use of deadly force. If the officers are not trained, then the first time there is a wrongful shooting, the city is going to have a problem. This is an area where there is an obvious need for some training from the start. There is no need for plaintiff to demonstrate a pattern or a custom if it is an "obviousness" kind of case.

The second method of establishing the requisite deliberate indifference is based on constructive notice. The need for training in the area or discipline in the matter may not have been obvious up front, but if there is a pattern of constitutional violations being committed by a municipality's officers in the same kinds of situations, at some point, there must be a realization that something must be done about the problem. If nothing is done about it, and if reasonable steps are not taken after this pattern of constitutional violations develops, then there will be liability under *City of Canton*.[41]

On the "obviousness" cases, one thing that plaintiffs must be careful of is that the constitutional violation not be too obvious. In *Walker v. City of New York*,[42] the plaintiffs made a claim that there was deliberate indifference in failing to train police officers not to commit perjury in court.[43] The court said that everybody knows

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[40] *Id.* at 389.

[41] 489 U.S. 378 (1989).

[42] 974 F.2d 293 (2d Cir. 1992). In *Walker*, the plaintiff spent 19 years in prison, after being convicted based upon the perjured testimony of police officers. *Id.* at 295.

[43] *Id.*

that one should not commit perjury in court.[44] The reasoning goes as follows: if the violation is that obvious, then it was not the failure to train the officers that caused the problem; officers, even without training, should know that perjury is not right. On the other hand, the court mentioned that if there had been a pattern of officers testifying falsely, that might present a different situation.[45] There are also a number of cases, many of them involving correctional guards sexually assaulting inmates and police officers raping suspects, where the courts have determined that it was not a failure to train that caused the underlying constitutional violation.[46]

One of the "obviousness" cases which is of particular interest is *Tazioly v. City of Philadelphia*[47] which involved case workers. In *Tazioly*, a child was initially taken from the home and was put back into the home with a drug addicted mother, which resulted in the child being killed.[48] The court found that given the nature of the duties assigned to case workers, the need for training and supervision is obvious, such that an inadequacy in this regard is

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[44] *Id.* at 299-300.

[45] *Id.*

[46] *See, e.g.*, Barney v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998) ("Even if the courses concerning gender issues and inmates' right were less than adequate, we are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates. Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior."); Andrews v. Fowler, 98 F.3d 1069, 1077 (8th Cir. 1996) ("In light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women."). *See also* Hayden v. Grayson, 134 F.3d 449, 457 n.14 (1st Cir. 1998) ("There has been no showing that whatever training was not provided to Grayson could have thwarted any such purposeful discrimination. Whereas law enforcement training might inform an officer about the proper methods to be used in mediating and diffusing crimes of domestic violence, for example, it does not necessarily follow that an officer intent on discriminating against a particular class of crime victims would be deterred from doing so by 'enlightenment' training, especially given the contraindications implicit in plaintiffs' other evidence that the challenged decision-making by Grayson resulted from alcohol abuse, or personal animosity toward individuals.").

[47] No. CIV.A.97-CV-1219, 1998 WL 633747, at *1 (E.D.Pa. Sept. 10, 1998) (unreported).

[48] *Id.* at *7.

very likely to result in a violation of the child's constitutional rights.[49] Thus, the Department of Human Services' policy makers can reasonably be said to have been deliberately indifferent to the consequences of employing untrained, overworked and unsupervised case workers.[50]

Another case where the potential for constitutional violations was not as obvious is *Guseman v. Martinez*.[51] In this case, the plaintiff decedent was put in a prone restraint and subsequently died because of it.[52] The district court found that it was not so obvious that using this kind of a restraint technique could result in death, such that it called for a policy or training up front. In other words, there had been no pattern of people dying from positional asphyxiation in this particular area, and there were no known court decisions finding that the use of prone restraint techniques was a violation of a person's constitutional rights. Therefore, the court held that it was not an area where there was an obvious need for training up front.[53]

In each of the constructive notice cases, there has been some kind of pattern demonstrated to put the municipality on notice that there was a problem.[54] In *Henry v. County of Shasta*,[55] post-event evidence was held to be admissible to show a pattern and notice. The lawsuit was filed on the basis of the municipality's policy of stripping and detaining people who had been stopped for traffic tickets and throwing them into a rubber room for ten hours. The

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[49] *Id.* at *14.

[50] *Id.*

[51] 1 F. Supp.2d 1240 (D. Kan. 1998).

[52] *Id.* at 1251.

[53] *Id.* at 1261. This case can be compared with the results from Gutierrez v. City of San Antonio. In *Gutierrez*, the Court was addressing the constitutionality of "hog tying" in the context of disposing of the qualified immunity defense raised by the individual defendants. The Court said that it was clearly established that the use of hog-tying could result in death, that it was a use of deadly force and that there should have been some policy or training as to the use of hog-tying. Gutierrez v. City of San Antonio, 139 F.3d 441, 445-51 (5th Cir. 1998).

[54] *See, e.g.*, Kerr v. City of West Palm Beach, 875 F.2d 1546 (11th Cir. 1989); Chew v. Gates, 27 F.3d 1432, 1445 (9th Cir. 1994); Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989).

[55] 132 F.3d 512 (9th Cir. 1997) *am. on den. of reh'g.* 137 F.3d 1372 (9th Cir. 1998).

municipality obviously continued to do it because there were two post event reports filed in addition to complaints filed by people after the fact. Therefore, the municipality was not only put on notice constructively, but also the municipality actually had a lawsuit filed against it, and the municipality still continued to do this.[56]

The jail suicide cases raise both obvious kinds of training problems as well as constructive notice kinds of training problems. These cases are very difficult, not because of the municipal liability issue, but generally because there is a problem showing the underlying constitutional Eighth Amendment or Fourteenth Amendment violation. In order to do so, one must first show actual, subjective knowledge that the person was suicidal or that there was a serious risk and a failure to take any reasonable steps to abate the risk. These cases appear to be very difficult for plaintiffs to prove.

The fourth method of establishing local government liability is by pointing to a final policy maker who has made a decision or committed an act that has resulted in a constitutional violation. The *Bryan County* case[57] and some post *Bryan County* cases should be discussed in this context. *Bryan County* ties together issues of *City of Canton*,[58] in an inadequate screening/hiring context, and issues raised in the final policy maker attribution cases.[59]

Bryan County involved a county sheriff who hired his nephew's son, Burns, as a deputy reserve,[60] despite the young man's long rap sheet. Since Burns had no felonies, he could be and was hired under the state law.[61] Two weeks later, he broke a woman's knee caps while removing her from a truck.[62] There was little question

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[56] *Id.* at 514.

[57] Board of the County Comm'r of Bryan County v. Brown, 117 S. Ct. 1382 (1997).

[58] City of Canton v. Harris, 489 U.S. 378 (1989).

[59] *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989); Praprotnik v. City of St. Louis, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

[60] 117 S. Ct. at 1387.

[61] *Id.* at 1386-87.

[62] *Id.*

that there had been an underlying constitutional violation, such as a Fourth Amendment use of excessive force. The issue was whether the county could be held liable under Section 1983 for that violation, on the theory that the county sheriff, who all conceded to be the final policy maker for the county on matters of law enforcement, made a single bad hiring decision.[63] Thus, the questions were: (1) Whether a single bad hiring decision by a final policy maker was sufficient to establish county liability? and (2) Whether there was the requisite deliberate indifference reflected in this decision under *City of Canton*?

On the question of whether a single decision by a final policy maker can establish municipal liability, the Court answered yes, but pointed out that in all of the cases where it has held that a single decision by a policy maker or policy-making body has been sufficient to establish liability, the policy maker has either directly committed the constitutional violation himself or ordered the constitutional violation to be committed.

For example, in *Pembaur v. City of Cincinnati,*[64] the county sheriff ordered the police to break down the door, and go into the clinic to get the witnesses when the police had capiases for the witnesses but no warrant to enter the premises.[65] This conduct was subsequently held to violate the Constitution,[66] and, while the individual officials were protected by qualified immunity, the conduct of the final policy maker was attributed to the County.

In two other cases, *Owen v. City of Independence*[67] and *City of Newport v. Fact Concerts, Inc.*[68] local legislative bodies were making administrative decisions that fired people or cancelled concerts. In these situations, constitutional violations were directly committed. The difference in *Bryan County* was that the county sheriff engaged in inadequate screening, which is not itself unconstitutional.[69] The Court concluded in *Bryan County* that for

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[63] *Id.*

[64] 475 U.S. 469 (1986).

[65] *Id.*

[66] *See* Sleagald v. United States, 451 U.S. 204 (1981).

[67] 445 U.S. 622 (1980).

[68] 453 U.S. 247 (1981).

[69] *Bryan County*, 117 S. Ct. at 1387.

these inadequate screening/bad hiring cases, the test is going to be a very rigorous one.[70] What a plaintiff is going to have to prove is that had this sheriff or policy maker in fact adequately screened the background record of his nephew's son, that it would have been "plainly obvious" that this particular constitutional violation would have occurred.[71] The majority of the Court in *Bryan County* did not think there was anything in Burns' record that made it plainly obvious that he was going to use excessive force on a suspect.[72] What must be considered is the particular background of the applicant in question.[73]

It is helpful to look at some post-*Bryan County* cases. In *Barney v. Pulsipher*,[74] the court said that the focus of the inquiry, in determining when a single poor hiring decision is sufficient to constitute deliberate indifference, appears to be on the actual background of the individual applicant, rather than the thoroughness or adequacy of the municipality's review of the application itself.[75] *Barney* involved a correctional guard who sexually assaulted several inmates. The court said there was nothing in this guard's background (he had been arrested for possession of alcohol at age seventeen and had several speeding tickets)[76] that would have indicated he would have committed sexual assault on the inmates.

There are some recent cases where courts have found the *Bryan County* standard satisfied in the bad hiring context. *Doe I v. Board of Education of Consolidated School District*[77] involved a teacher who had been rehired after there had been complaints that he had had an affair with a student. The court held that the officials of the school had known that the teacher had been previously

[70] *Id.* at 1389.
[71] *Id.* at 1392.
[72] *Id.* at 1393.
[73] *Id.*
[74] 143 F.3d 1299 (10th Cir. 1998).
[75] *Id.* at 1308.
[76] *Id.*; *see also* Snyder v. Trepagniev, 142 F.3d 791, 797 (5th Cir. 1998) (claim that City's screening policies were inadequate failed *Bryan County* test where officer had admitted to two nonviolent offenses which would not have made use of excessive force "plainly obvious"), *cert. granted on other grounds*, 119 S. Ct. 863 (1999).
[77] 18 F. Supp.2d 954 (N.D. Ill. 1998).

involved with another student. When the school rehired him, it was predictable that he might repeat his wrongful behavior.[78]

In *Raby v. Baptist Medical Center*,[79] a police officer, who had been fired from the department after complaints of aggressive behavior was hired by the Medical Center as a security guard.[80] Plaintiff demonstrated that the hiring personnel knew of the officer's background and of the history of his aggressions.[81] In *Raby*, plaintiff complained of the use of excessive force by the security guard. The court concluded that the plaintiff's evidence was sufficient to satisfy the *Bryan County* causal connection requirement and to establish the deliberate indifference of the Medical Center to the plainly obvious consequences of hiring this officer.

While the *Bryan County* "plainly obvious consequence" test may be a stringent one for plaintiffs to meet, these recent cases make it clear that the standard is not insurmountable.

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[78] *Id.* at 960-61.

[79] 21 F. Supp.2d 1341 (M.D. Ala. 1998).

[80] *Id.* at 1352.

[81] *Id.* at 1353; *see also* Kesler v. King, 29 F. Supp.2d 356, 369 (S.D. Tex. 1998) (decision to recommend the hiring of a former corrections officer who had been convicted of beating an inmate created substantial risk that inmates' right to be free from excessive force would be violated).