



**TOURO UNIVERSITY**  
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**Touro Law Review**

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Volume 15 | Number 4

Article 17

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1999

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### Recommended Citation

Ryals, Stephen M. (1999) "Proof of Monell Liability from the Plaintiff's Perspective," *Touro Law Review*. Vol. 15: No. 4, Article 17.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol15/iss4/17>

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## PROOF OF *MONELL* LIABILITY FROM THE PLAINTIFF'S PERSPECTIVE

*Stephen M. Ryals*<sup>1</sup>

*Honorable George C. Pratt:*

Next we take a more practical look at some of the problems in proving municipal liability, and for that we turn to Steve Ryals, who has had some experience in that area.

*Steve Ryals:*

In my world, I try to figure out the meaning of these esoteric Supreme Court opinions and the variances between majority opinions and the dissents, and what it all means in practice.

The most interesting proof issues in *Monell*<sup>2</sup> cases arise, in my opinion, in the police misconduct context. There are essentially three types of cases of *Monell* liability. The first is where you have the governmental entity enacting an ordinance or regulation that violates the Constitution.<sup>3</sup> Those are simple cases. There is not much in the way of interesting analysis to be made on the proof issues.

The second case is where you have a policy maker doing something that violates someone's rights.<sup>4</sup> The question is whether you have found the right policy maker, and that is always a question of State law and a question of fact as well. The second concern is whether the policy maker's act violated the Constitution. The first and, perhaps only, violation is sufficient to impose

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<sup>2</sup> See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

<sup>3</sup> *Bd. of County Comm'r of Bryan County v. Brown*, 117 S. Ct. 1382, 1395 (1997) (Souter, J., dissenting).

<sup>4</sup> *Pembaur v. Cincinnati*, 475 U.S. 469, 480-81 (1986).

liability. Again, there is not much in the way of interesting analysis to do in that case.

What is really fascinating about *Monell* cases are the cases under the *City of Canton v. Harris*<sup>5</sup> paradigm, involving either an obvious need for some training or a pattern or custom and practice of violations that gives rise to a need for some action.<sup>6</sup>

Let me try to simplify, for practical use, the concepts that we have been talking about and particularly the concepts that are described in Professor Blum's discussion.

I think that it makes the most sense from the plaintiff's standpoint to talk about the *City of Canton* rule as requiring a failure to act and generically refer to such cases as a failure to act cases.<sup>7</sup> As soon as you call it a failure to train theory of liability and you write that in your pleadings, you focus your thoughts on training as the government deficiency. I have been burned by this and I have seen it happen in other cases where the defense proffers a mountain of evidence that they have trained their officers in accordance with state law, that they have retraining, they have continuing education, and all of a sudden your failure to train – and therefore your *Monell* case does not look so good.<sup>8</sup> However, if you look at it in more generic terms, as the duty of the government to act in the face of constitutional transgressions, you are going to be better served. It will get your thinking directed in a way that is not going to leave you boxed in down the road.

Also, the term deliberate indifference in the context of causing a violation, is very confusing in the application. As I read the cases, I think the courts are confused about the application of this concept. While deliberate indifference may be an objective standard in the

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<sup>5</sup> 489 U.S. 378 (1989)

<sup>6</sup> *Id.* at 388 (holding that "the inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.").

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987) (failure to act after shooting incident); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988).

Fourth Amendment context, in my experience and in reading these cases, I draw the conclusion that what the courts want is something closely akin to intent.<sup>9</sup>

I recommend to you, if you have not read Justice Souter's dissent in *Bryan County*,<sup>10</sup> read it for the education it will give you about this area of the law. In two columns, Justice Souter describes what we have been discussing in a very coherent and succinct fashion.<sup>11</sup> He mentions or suggests that deliberate indifference is tantamount to intent.<sup>12</sup> I think that the reason it is important as a practitioner to think about it in those terms is because as soon as you start sliding toward thinking of it as negligence you are going to get in trouble.

A failure to act infers negligence, but clearly more than mere negligence is required. So, if you think about it as intent, you are never going to fall short. If you can prove intent you are never going to be wrong.

The causation required in *Monell v. New York Dept. of Social Services*<sup>13</sup> talks about the failure to act and the policy being the moving force behind the violation.<sup>14</sup> Again, I think the only way it makes sense is to view the action as if it requires direct causation between the failure of the municipality and the violation.

The *Bryan County* case gives you cause to stop and think about whether you have to prove a specific violation was likely to be caused or whether mere proof of any violation will suffice.<sup>15</sup>

You may be familiar with the *Bordanaro v. McLeod*<sup>16</sup> case in which it was proved that this department had a policy, a custom, and long standing practice of kicking down doors without a warrant.<sup>17</sup> The court held that the proof was sufficient to hold the municipality liable for the excessive force that occurred inside the

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<sup>9</sup> *City of Canton*, 489 U.S. at 389.

<sup>10</sup> *Bd. of County Comm'r of Bryan County v. Brown*, 117 S. Ct. 1382, 1394 (1997) (Souter, J. dissenting).

<sup>11</sup> *Id.* at 1394.

<sup>12</sup> *Id.* at 1395.

<sup>13</sup> 436 U.S. 658 (1978).

<sup>14</sup> *Id.* at 694.

<sup>15</sup> *Bryan County*, 117 S. Ct. at 1391.

<sup>16</sup> 871 F.2d 1151 (1st Cir. 1989), *cert. denied*, 493 U.S. 820 (1989).

<sup>17</sup> *Id.* at 1159-61.

room after they kicked down the door without a warrant.<sup>18</sup> I am not sure, under the *Bryan County* analysis, whether that proof would be sufficient because you are talking about a policy having to do with the search of buildings as opposed to a policy involving the Fourth Amendment violation for excessive force.

In trying to show notice of custom and practice and failure to act, the same evidence that shows notice will often prove what the policy is. I think a most compelling bit of evidence is if the department happens to have a name for what you are describing.

If the police lexicon has adopted a term that describes what you are saying is a policy, is that not proof that they have a pervasive practice? If it is not a pervasive practice why did they name it? For instance, in *Spell v. McDaniel*,<sup>19</sup> they had a policy of arresting people, taking them to jail, beating them, and then talking about it later.<sup>20</sup> It was called “kick ass to take names,” and all the officers knew it.<sup>21</sup> The officers were trained in this practice by the chief of police in his own police academy.<sup>22</sup>

How many of you have had a person complain that they were put in the back of a paddy wagon and then taken for a ride where they were injured as a result of being thrown against the sides of the van? Do you know what they call that in some police circles? The police call it a “screen test,” because of the screen the passenger is thrown against. “We are going to give the guy a screen test.” It is also called “waffling,” as in the citizen’s face looks like it came in contact with a waffle iron.

I have had a police officer refer to an arrest as a “chump arrest.” I have heard police officers refer to bad arrests as “contempt of cop arrests.” Those are arrests where there is no probable cause. Where the reason a person is being arrested and detained is because they ticked the cop off and he is going to mete out his measure of street justice. Another example, a “throw down gun” seen in

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<sup>18</sup> *Id.* at 1162-63.

<sup>19</sup> 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988).

<sup>20</sup> *Id.* at 1392.

<sup>21</sup> *Id.* at 1393.

<sup>22</sup> *Id.*

*Webster v. Houston*,<sup>23</sup> demonstrates they have a policy of placing guns in hands of people who they allege have threatened them.

Of course the ultimate trial presentation in these cases is driven by what you do in discovery. It is important to emphasize that you have to prepare not for trial alone but for the summary judgment motions that inevitably follow the filing of one of these lawsuits.

In proving *Monell* liability, my observations and experience, and, from reading the cases, shows that small departments are different than large departments. *Bordanaro v. Mcleod*<sup>24</sup> and *Grandstaff v. The City of Borger*<sup>25</sup> both demonstrate cases of *Monell* liability, and both of them involved the entire night shift of a given small town department.<sup>26</sup> The *Monell* case may be easier to make against a small department.

Furthermore, the more officers you have involved in a given transgression the more likely it is that the court is going to find that it is part of the ingrained custom and practice of that department. Compare that observation to *Carter v. District of Columbia*,<sup>27</sup> where the court said the department had approximately 1,315 complaints of police abuse over a period of time.<sup>28</sup> If that is a measure of a constitutional violation, then every large department in the country would be guilty of violating the constitution.<sup>29</sup> So there is some sentiment in the cases to dismiss that kind of evidence when you have a large department and many officers coming into contact with many citizens.

In my experience almost all successful *Monell* cases have some component of evidence that the case is made from the mouth of the defendant officers or from a defendant witness. You would be amazed at the quotable quotes you get from commanders. There is one that comes to mind in *Parish v. Luckie*.<sup>30</sup> In that case the chief of police said he stopped his officers from giving him use of force

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<sup>23</sup> 689 F.2d 1220, 1222-23 (5th Cir. 1982).

<sup>24</sup> 871 F.2d 1151 (1st Cir. 1989).

<sup>25</sup> 767 F.2d 161 (5th Cir. 1985).

<sup>26</sup> *Bordanaro*, 871 F.2d at 1156; *Grandstaff*, 767 F.2d at 171.

<sup>27</sup> 795 F.2d 116 (D.C. Cir. 1986).

<sup>28</sup> *Id.* at 123 n.6.

<sup>29</sup> *Id.* at 123.

<sup>30</sup> 963 F.2d 201 (8th Cir. 1992).

reports because he did not want to hear about them anymore.<sup>31</sup> The plaintiff's lawyer questioned the chief on why he stopped that. The chief responded that, "I was getting reports of too much excessive force being used."<sup>32</sup>

There is another case, *Depew v. City of St. Marys*,<sup>33</sup> where the chief admitted having a problem with excessive force but stated "[a]t six bucks an hour, you take what you can get."<sup>34</sup> Those kind of quotes, obviously from a plaintiff's perspective, get blown up on a big poster board and are displayed to the jury at trial.

The primary evidence you are going to develop in the proof of *Monell* liability in a *City of Canton* case against the police where you are trying to show notice and a failure to act will come from department records. The primary source of department records are internal affairs records, personnel files, and the manual. You also have records such as the desk book, the arrest book, and memos from inside the department.

If you look at the appendix in my materials, I copied some entries in appendix B regarding an arrest book from a small municipality in the St. Louis area. I do not know how probative these entries might be. By the way, there is one particular officer who makes reference to African-Americans in racially derogatory terms. I do not know how probative that kind of evidence would ultimately be in, for example, an excessive force case against that municipality. I discovered this evidence in the context of an employment case. It had nothing to do with Section 1983 actions but I thought it was illustrative.

I would vigorously argue that this sort of misconduct cannot go on in a department, generally speaking, unless the department has run amok - unless there is a lack of supervision over the attitude and conduct of police officers.

Now, this particular evidence in appendix B may not prove that the department has a specific policy of, for example, using excessive force or of wrongfully searching people. However, I

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<sup>31</sup> *Id.* at 205.

<sup>32</sup> *Id.* at 205.

<sup>33</sup> 787 F.2d 1496 (11th Cir. 1986).

<sup>34</sup> *Id.* at 1498.

think if this was an African-American person, it would be some evidence of that and certainly if this officer was involved it would be great evidence of that.

In the context of internal affairs records there are many issues that arise. The question arises whether you are going to be able to use only the records of the officer or of the entire department. Also, the issue arises whether the records have to involve similar misconduct allegations or whether they can be dissimilar. In other words, if you have a long record of complaints against the police department about discourtesy, about bad car stops, and about failing to answer calls, are all those kinds of records going to be admissible and probative as to liability for excessive force?

Another problem that you have to face as the plaintiff is how you present the internal affairs records. The issue is whether you present mere statistics or the records themselves or anecdotal evidence in the form of testimony from the prior complainers, or some version of that sort of evidence.

Also, there is a really strong current, I hope it is not too strong, in the law that says, unsustained complaints have zero value. They do not prove anything.<sup>35</sup> There is a recent case, *Gold v. Miami*,<sup>36</sup> that reaffirms that theory.<sup>37</sup> As a plaintiff, it is very important that you educate the court and argue strongly that unsustained complaints demonstrate, if nothing else, that the agency should be on notice that there is a potential problem in their department.<sup>38</sup>

The quandary with sustained versus unsustained complaints is that, if you find, when you do your discovery, that the department has a lot of sustained complaints, the defense is going to come back and argue that the complaints are sustained and that, therefore, there is an effective internal affairs function. Furthermore, if you have unsustained complaints, they are going to say, they are not sustained because there was no merit and, therefore, there is no

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<sup>35</sup> Brooks v. Scheib, 813 F.2d 1191, 1193 (11th Cir. 1987).

<sup>36</sup> 121 F.3d 1442 (11th Cir. 1997), *reh. den.*, 138 F.3d 886 (11th Cir. 1998).

<sup>37</sup> *Id.* at 1446-47.

<sup>38</sup> See, e.g., Beck v. City of Pittsburgh, 89 F.3d 966 (3d Cir. 1996); Saviour v. City of Kansas City, 1992 WL 135019 (D. Kan. 1992).

problem. I am going to discuss, in a moment, expert testimony and how you can be aided in explaining these issues with an expert.

As to internal affairs records, you have to be concerned with whether you are talking about post-event or pre-event misconduct allegations. As Professor Blum pointed out, post-event allegations are relevant. In fact in the *City of Grandstaff v. Borger*,<sup>39</sup> the only evidence of policy cited by the court was the failure to properly investigate the complaint afterwards and the indifference of the department in relation to the event.<sup>40</sup> There was no evidence of prior misconduct.<sup>41</sup> There are other cases that support the admission of subsequent misconduct allegations. Recent cases such as *Beck v. Pittsburgh*<sup>42</sup> and *Vann v. New York*,<sup>43</sup> support that proposition.

The other records that aid you in presenting *Monell* liability issues are the personnel files, manual of regulations, the desk book, and the memos. If you are lucky enough to be in a municipality such as New York, Los Angeles, Boston or Philadelphia perhaps, where there has been a commission study on the department, there is strong support for the proposition that you can offer the results of the commission studies in support of *Monell* liability.<sup>44</sup> I recommend that you read the decision in *Gentile v. County of Suffolk*<sup>45</sup> for its excellent discussion of this point.

There are sources, though you may not commonly think of them as supporting *Monell* liability, that at least may educate the court. I think that educating the court is part of what the plaintiff has to do

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<sup>39</sup> 767 F.2d 161 (5th Cir. 1985).

<sup>40</sup> *Id.* at 170-71. The court stated that "[t]he City's consciously indifferent training of its officers was found to be a proximate cause of [his] death." *Id.* at 170.

<sup>41</sup> *Id.* at 171.

<sup>42</sup> 89 F.3d 966, 972 (3d Cir. 1996). The police officer has exhibited a pattern of inappropriate behavior of violence and excessive force within five years, occurring after this plaintiff's experience. *Id.* at 972. The court noted that since the complaints occurred within a narrow period of time, a reasonable jury could infer that the Chief of Police "knew, or should have known, of Officer Williams's violent behavior in arresting citizens." *Id.* at 973.

<sup>43</sup> 4 F. Supp.2d 327, 330-31 (S.D.N.Y. 1998).

<sup>44</sup> *Gentile v. County of Suffolk*, 926 F.2d 142, 148-49 (2d Cir. 1991).

<sup>45</sup> *Id.*

on police matters and police issues. In the *City of Grandstaff v. Borger*,<sup>46</sup> the judge was critical of the police for not shooting at the tires of a fleeing suspect,<sup>47</sup> as if that was a proper way to apprehend the suspect. That judge needed to be educated because it has been years since any police standards allow shooting at a vehicle or shooting at the tires, for any reason.

There are national standards by which police activity may be judged. Part of what you are trying to prove under *Monell* is that the department deviated from some standard of conduct.

I suggest to you that there are excellent resources in this area of law. I have cited a couple of them. Let me give you an illustration of how they might assist you. Current professional police standards suggest that it is important to have a use of force reporting system within the police department because it allows commanders to monitor the uses of force. There is a standard published by CALEA, the Commission on Accreditation of Law Enforcement Agencies,<sup>48</sup> which requires that a written report be submitted whenever an employee discharged a firearm or applied force through the use of lethal or less than lethal weapons.<sup>49</sup> Also, there is a commentary that tells the court and everyone else why an agency should carefully examine all incidents where its employees have caused or alleged to have caused death or injury to another.<sup>50</sup> The intent of the standard is to ensure that each event is properly documented and the idea is that it gives the municipality notice and the ability to monitor.

The Police Foundation, a police think-tank, has also conducted a study on misuse of force. They also recommend that the personnel files of the department contain similar information about discipline records. There are resources that inform both counsel and the court of the proper standards, and guide the municipality in what standards they should apply or what standards should be applied.

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<sup>46</sup> 767 F.2d 161 (5th Cir. 1985).

<sup>47</sup> *Id.* at 171.

<sup>48</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, § 6035.9 (1998).

<sup>49</sup> See, e.g., OR. ADMIN. R. 291-022-0030 (1997).

<sup>50</sup> See, e.g., N.J. ADMIN. CODE tit. 10A, § 3-3.8 (1999).

Ultimately, you may be aided; and I suggest a lot of the cases encourage the use of an expert witness. Much of the evidence that you develop – internal affairs statistics, the department manual, the express attitudes of commanders – may be foundational for any expert’s opinion about a department’s failure to act in the face of notice of the need to act.<sup>51</sup> Without an expert to explain what the statistics from internal affairs mean, what difference does it make? What does it show of a police agency when they have 1,300 complaints and they only sustained 21 of them? What does that mean? To the court in *Carter*, it did not mean anything. However, it helps an expert who has skill, knowledge or training in the area of monitoring and analyzing these issues, to explain to the court and jury that the number of complaints for excessive force is an indication that there is a problem in the department. Therefore, they are on notice and if they are professionally acting police administrators they should act, and their failure to act is actionable.

I will leave you with one thought. I once told a U.S. District Judge that I intended to make a case of *Monell* liability in an excessive force case and she looked at me and said, “Good luck.” So to all you plaintiff’s lawyers, I say to you, “Good luck.” To you defense lawyers who root for the strengthening of the preclusive laws, be careful what you wish for because you are getting what you wish for and you are going to put yourself out of a job.

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<sup>51</sup> See FED. R. EVID. 70.