

1979

Civil Rights - The Status of Official and Municipal Immunity from Damage Actions under 42 U.S.C. 1983 - Monell v. Department of Social Services of the City of New York

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Recommended Citation

Wolfe, Lawrence J. (1979) "Civil Rights - The Status of Official and Municipal Immunity from Damage Actions under 42 U.S.C. 1983 - Monell v. Department of Social Services of the City of New York," *Land & Water Law Review*: Vol. 14 : Iss. 1 , pp. 281 - 290.

Available at: https://scholarship.law.uwyo.edu/land_water/vol14/iss1/11

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CIVIL RIGHTS—The status of official and municipal immunity from damage actions under 42 U.S.C. § 1983. *Monell v. Department of Social Services of the City of New York*, 436 U.S.____, 98 S.Ct. 2018, 56 L.Ed.2d. 611 (1978).

In 1971 female employees of the New York City Board of Education and the New York City Department of Social Services brought a class action suit under 42 U.S.C. § 1983 (1970).¹ The plaintiffs challenged the constitutionality of agency policies that forced pregnant employees to take an unpaid leave of absence prior to the time required by medical reasons. The suit sought injunctive relief and back pay for the periods of unlawful forced leave. The District Court for the Southern District of New York concluded that enforcement of the policies was unconstitutional² under *Cleveland Board of Education v. LaFleur*³, but held moot plaintiff's claim for injunctive relief since the defendant agencies had changed their maternity leave policies. The court also denied plaintiff's prayers for back pay because of the immunity conferred upon municipalities by *Monroe v. Pape*.⁴

The Court of Appeals for the Second Circuit affirmed.⁵ The court held that the Board of Education was not a person under 42 U.S.C. § 1983 because "it performs a vital governmental function."⁶ The court recognized that the individual defendants, even when sued in their official capacities, were persons under Section 1983 but it denied jurisdiction over these officials because any damage award would "have to be paid by a city that was held not to be amenable to such action in *Monroe v. Pape*."⁷

The Supreme Court granted certiorari to consider:

Whether local governmental officials and/or local independent school boards are "persons" within the

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1. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1970).
2. *Monell v. Department of Social Service of the City of New York*, 394 F. Supp. 853 (S.D.N.Y. 1975).
3. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). This case held that maternity leave policies that forced pregnant employees to take unpaid leaves prior to the time required for medical reasons were unconstitutional.
4. *Monroe v. Pape*, 365 U.S. 167 (1961).
5. *Monell v. Dept. of Soc. Ser. of the City of N.Y.*, 532 F. 2d 259 (2d Cir. 1976).
6. *Id.* at 263.
7. *Id.* at 265.

meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?⁸

In a surprising reversal, the court abandoned seventeen years of precedent and overruled *Monroe*⁹, "insofar as it holds that local governments are wholly immune from suit under Section 1983."¹⁰ The court, in a seven to two decision, undertook a fresh analysis of the debates on the Civil Rights Act of 1871.¹¹ It decided, contrary to *Monroe*,¹² that Congress had intended to include municipalities within the ambit of the "person" liable under what is now 42 U.S.C. § 1983.¹³ In striking down municipal immunity, *Monell* resolved one of the major difficulties facing Section 1983 litigants, however, the court purposefully left unaddressed the "full contours of municipal liability."¹⁴ The court held that municipalities could not be liable on a *respondeat superior* theory of vicarious liability¹⁵ but beyond that limitation the court would not venture. This note will examine briefly the effect of *Monell* upon official immunity. It will then consider the issues of where the lines of municipal liability should be drawn, and whether a residual municipal immunity has survived.

THE CAUSE OF ACTION UNDER SECTION 1983

The elements of a cause of action under 42 U.S.C. § 1983 are: (1) that the conduct complained of was engaged in under color of state law, and (2) that such conduct deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws.¹⁶ It is important to note that the type of action that is brought under Section 1983 determines which of the elements will be the central issue in the litigation. In Wyoming and the Tenth Circuit the bulk of cases under Section 1983 have been suits against school boards alleging impermissible firing of teachers or disciplin-

8. *Monell v. Dept. of Soc. Ser. of the City of N.Y.*, 436 U.S. ___, 98 S.Ct. 2018, 2021 (1978) [hereinafter cited as *Monell*].

9. *Monroe v. Pape*, *supra* note 4.

10. *Monell*, *supra* note 8, at 2022.

11. *Id.* at 2023.

12. *Monroe v. Pape*, *supra* note 4.

13. *Monell*, *supra* note 8, at 2035.

14. *Monell*, *supra* note 8, at 2041.

15. *Id.* at 2036.

16. *Jones v. Hooper*, 410 F. 2d 1323, 1326 (10th Cir. 1969), *Cert. denied* 397 U.S. 991 (1970).

ing of students. In these cases it is conceded that the school boards are acting under color of state law, so the cases are decided solely on the issue of whether a protected right has been violated.¹⁷ The main immunity question in these cases is the presence of a qualified privilege for the responsible officials.

In other Section 1983 actions, especially cases involving police officers, prison officials, or bureaucratic decisions the central issue is whether the official was acting under color of state law or on his own initiative in excess of established limits.¹⁸ These cases raise the question of the extent to which municipalities are immune for the acts of their officials.

STATUS OF OFFICIAL IMMUNITY IN WYOMING

It is doubtful that *Monell* affects the present status of official immunity in Wyoming. It could be argued that because officials have historically derived their immunity from the municipalities that employ them, *Monell*, by destroying the municipal immunity also strips away the official privilege.¹⁹ However, this argument has little support because the U.S. Supreme Court has developed a separate standard for official immunity, independent of municipal immunity.

Since the seminal civil rights decision of *Monroe*²⁰, the courts have held individuals liable under Section 1983 for actions taken in their official capacity. But this liability has always been read against the interpretation that the Reconstruction Congress did not intend in enacting Section 1983 "to abolish wholesale all common law immunities."²¹ The Supreme Court has held that an immunity exists to the extent historically accorded by the common law to the official.²² The immunity is absolute for legislators,²³ judges,²⁴

17. See, *Bertot v. School Dist. No. 1, Albany County, Wyo.*, 522 F.2d 1171 (10th Cir. 1975); *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973).

18. *Rizzo v. Goode*, 423 U.S. 362 (1976) (police officers); *Procunier v. Navarette*, 434 U.S. 362 98 S.Ct. 855 (1978) (prison officials).

19. Minge, *Governmental Immunity From Damages Actions in Wyoming*, 7 LAND & WATER L. REV. 229, 242 (1972).

20. *Monroe v. Pape*, *supra* note 4.

21. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

22. *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).

23. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

24. *Pierson v. Ray*, *supra* note 21.

and prosecutors,²⁵ but is only qualified for all other executive officers.²⁶

In a post-*Monell* case the Wyoming Supreme Court has outlined the scope of the qualified official privilege. In *Board of Trustees of Weston County School District No. 1 v. Holso* the court affirmed a district court ruling reinstating the teacher plaintiff and granting damages and attorneys fees against the superintendent under Section 1983.²⁷ The court analyzed the superintendent's privilege under the qualified, good faith immunity standard announced by the U.S. Supreme Court in *Wood v. Strickland*.²⁸ The Wyoming court held that in order to be entitled to the immunity, the defendant:

Must demonstrate by a preponderance of the evidence (1) that he acted without malicious intention to deprive the plaintiff of his constitutional rights or cause him to suffer other injury, and (2) that he did not know and reasonably need not have known that his conduct violated the constitutional rights of the party affected.²⁹

The court found for the plaintiff by showing that actual malice existed and that the defendant "knew or should have known, that the action he took would cause a deprivation of plaintiff's constitutional right to privacy."³⁰ The *Wood v. Strickland*³¹ test has been adopted by the Tenth Circuit³² and it has been given additional support by two recent U.S. Supreme Court cases, *Butz v. Economou* holding federal executive officers to a qualified immunity,³³ and *Procunier v. Navarette* holding prison officials to the same standard.³⁴

*Holso*³⁵ makes it clear that the official immunity doctrine is unaffected by *Monell*. The Wyoming court recognized *Monell* but did not discuss the case because there was

25. *Imbler v. Pachtman*, *supra* note 22.

26. *See list*, *Downs v. Sawtelle*, 574 F.2d 1, 11 (1st Cir. 1978).

27. *Board of Trustees of Weston Cty. Sch. Dist. No. 1 v. Holso*; *Alberts v. Holso*, ___ P.2d ___, (Wyo. 1978) (No. 4807 and 4808 decided August 28, 1978).

28. *Wood v. Strickland*, 420 U.S. 308 (1975).

29. *Board of Trustees of Weston Cty. Sch. Dist. No. 1 v. Holso*, *supra* note 27, at 14.

30. *Id.* at 14.

31. *Wood v. Strickland*, *supra* note 28.

32. *Bertot v. Sch. Dist. No. 1, Albany County, Wyo.*, *supra* note 17.

33. *Butz v. Economou*, ___ U.S. ___, 98 S.Ct. 2894 (1978).

34. *Procunier v. Navarette*, *supra* note 18.

35. *Board of Trustees of Weston Cty. Schl. Dist. No. 1 v. Holso*, *supra* note 27.

no concern about the board of trustee's liability. In summary, the Wyoming court has set a standard for official privilege that is independent of the *Monell* abrogation of municipal immunity.

THE LIMITS OF MUNICIPAL IMMUNITY AFTER MONELL

The scope of municipal liability under Section 1983 after *Monell* is difficult to determine. The court, by not addressing the issue, has left to the lower courts the job of evolving an appropriate standard. The only definite limit that the court sets is a determination that a municipality should not be held liable under the *respondeat superior* theory solely because it employed a tortfeasor.³⁶ The court reached this conclusion by an analysis of the legislative history behind the enactment of the Civil Rights Act of 1871.³⁷ The rationale for the *respondeat superior* doctrine was analyzed by the *Monell* court and it was not persuaded that the doctrine would accomplish its stated purposes of reducing accidents and spreading the risk of injury among all citizens.³⁸

The *respondeat superior* limitation is of little usefulness in the attempt to determine exactly the types of activities for which a municipality should be liable. The weakness of the *respondeat superior* limit is that all actions of a municipality can only be performed through its agents, and thus all municipal liability is in a sense vicarious.³⁹ The court "by rejecting vicarious liability . . . had rejected one end point on the spectrum of responsibilities that might be cast on state and local governments, but it has not indicated what lesser responsibility should be expected."⁴⁰

To determine what municipalities can expect to be held liable for, it is essential to look at the language of the court in *Monell*. The language that the lower courts will probably focus upon is Justice Brennan's statement that:

36. *Monell*, *supra* note 8, at 2047 (J. Powell, concurring).

37. *Id.* at 2036.

38. *Id.* at 2037-2038.

39. *Adekalu v. N.Y. City*, 431 F. Supp. 812 (S.D.N.Y. 1977).

40. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J., 1483, 1541 (1977).

This excellent article was cited by the *Monell* court. *Monell*, *supra* note 8, at 2044 (J. Powell, concurring).

Local government bodies can be sued . . . where . . . the action that is alleged to be unconstitutional implements, or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.⁴¹

They may also be sued for "constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels."⁴²

In analyzing this language the question the lower courts must address is exactly what elements constitute the cause of action against a municipality. One district court prior to *Monell* concluded that there should be liability where "a pattern or practice of unconstitutional activity . . . may fairly be found to result from policies or actions of persons holding such high municipal office that they can reasonably be held to reflect municipal policy."⁴³

The broad language of the *Monell* court and the reasoning in *Adekalu v. New York City*⁴⁴ have been echoed in two post-*Monell* court of appeals decisions. In both cases policemen markedly exceeded their authority, and the courts had little difficulty finding the municipality not liable.⁴⁵ These cases are easy for the courts as are cases such as *Monell* where a clearly unconstitutional policy has been enforced. The courts will have much greater difficulty elucidating an appropriate standard for those cases where constitutionally questionable policies or practices are combined with officials who may be exceeding their stated authority. These cases will involve questions of the municipality's duty to supervise employees and the specificity with which grants of authority are given to these officials.

The Supreme Court has given some indication of how it will treat such cases by its decision in *Rizzo v. Goode*.⁴⁶ Despite District Court findings that a number of citizens

41. *Monell*, *supra* note 8, at 2035-2036.

42. *Id.* at 2036.

43. *Adekalu v. N.Y. City*, *supra* note 39.

44. *Id.* at 813.

45. *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978).

46. *Rizzo v. Goode*, *supra* note 18.

had their civil rights violated by the Philadelphia police department the Court rejected the lower court decree ordering changes in the city's police department. The Court found that the infringements had not been fostered by high level officials and declined to attribute the actions of the police officers to the city government. *Rizzo v. Goode* was cited by the *Monell* court in support of the proposition that "the mere right to control without any control or direction having been exercised and without and failure to supervise is not enough to support Section 1983 liability."⁴⁷ *Rizzo v. Goode* represents a more difficult factual situation than *Monell* but the result seems to fit the *Monell* language of a need to show that the acts resulted from an "official policy of some nature."⁴⁸

The appropriate standard for finding a municipality liable should evolve from a flexible interpretation of the broad *Monell* language of what constitutes a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."⁴⁹ The plaintiff should not have to show a consistent, pervasive pattern of officially sanctioned constitutional violations.⁵⁰ However, there must be more than just an isolated incident. A cause of action based on excessive delegation of authority or negligent supervision should succeed if the plaintiff can show governmental "custom"⁵¹ or an "official policy of some nature."⁵² The facts will control the analysis and the courts must investigate closely the relationship between the official's actions and the policies that this action seeks to implement.

A RESIDUAL IMMUNITY AFTER MONELL

In *Monell* Justice Brennan reserved the question of whether there is some form of municipal immunity remain-

47. *Monell*, *supra* note 8, at 2037 n. 58.

48. *Id.* at 2036.

49. *Id.* at 2036.

50. *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252, 266 n. 14 (1977). Consistent pattern of official racial discrimination not necessary predicate to violation of equal protection clause.

51. *Monell*, *supra* note 8, at 2036.

52. It should be noted that the Congress is currently considering the Civil Rights Improvement Act of 1977. The act embodies the *Monell* result and sets standards for the imposition of governmental liability. *See*, S. 35, 95th Congress, 1st Sess., 123 Cong. Rec. S205 (daily ed. Jan. 10, 1977). Section 2(c)(1) of the bill would make state

ing.⁵³ Justice Powell hints that an immunity may still exist, presumably based in common law. He suggests the possibility that a qualified immunity “may remove some of the harshness of liability for good faith failure to predict the uncertain course of constitutional adjudication.”⁵⁴ The theories that support municipal immunity have been much criticized, and the recent trend has been to severely restrict or abolish all immunities. Wyoming is the most recent state to abrogate municipal immunity. In *Oroz v. Board of County Commissioners of Carbon County*, the Wyoming Supreme Court held that municipalities will have to defend as ordinary persons.⁵⁵ In the face of decisions such as *Oroz* and the overwhelming trend toward expanding municipal liability, it is difficult to determine what residual immunity survives after *Monell*.

The U.S. Supreme Court has never addressed the question of a limited municipal immunity because, until *Monell*, municipalities were absolutely immune under *Monroe v. Pape*.⁵⁶ In contrast to the doctrine of official immunity, which has been developed in decisions spanning three decades,⁵⁷ there is no body of Supreme Court precedent that outlines a qualified good faith municipal privilege. In trying to define an appropriate standard of municipal immunity the courts could look to state law. However, this approach would seem to undermine the basic premise of Section 1983, which is to create a federal cause of action to redress civil rights violations.⁵⁸ By deferring to state law the rights of Section 1983 litigants would be subjected to the peculiarities of each state’s position on governmental immunities, and identical causes of action in two different states may receive vastly different treatment.

The lower courts could also try to use the language of Justice Powell’s footnote as the basis for a standard and confer immunity “for good faith failure to predict the uncertain

and local governments liable if their responsible officials “directed, authorized, approved or encouraged” subordinates to infringe federal rights or if they failed to take action against “a pervasive pattern of unconstitutional or unlawful conduct” among subordinates. *Id.* § 2(c)(1).

53. *Monell*, *supra* note 8, at 2041.

54. *Id.* at 2047 n. 9 (J. Powell concurring).

55. *Oroz v. Board of County Commissioners of Carbon County*, 575 P.2d 1155. (Wyo. 1978).

56. *Monroe v. Pape*, *supra* note 4.

57. DAVIS, ADMINISTRATIVE LAW, § 26.00 - 26.00-4 (Supp. 1976).

58. *Monroe v. Pape*, *supra* note 4.

course of constitutional adjudication.”⁵⁹ It would seem, however, that such a standard should have been applicable to the *Monell* facts. In *Monell* the school board issued their maternity leave policies in conformance with what was then established law. The suit was brought in 1971 and the policies were changed in 1971-72.⁶⁰ It was not until 1974, in *Cleveland Board of Education v. LaFleur*⁶¹, that such pregnancy leave policies were declared unconstitutional. Applying the Justice Powell standard it could be argued that the *Monell* board should have had a qualified immunity. However, in 1978, the court held the board liable for back pay. In light of the *Monell* facts and its holding, Justice Powell’s footnote does not provide the lower courts with any clear guidance on the residual immunity issue.

The *Monell* holding seems contradictory. The court abolishes absolute immunity yet it holds out a hope that this new liability will be tempered with a qualified immunity. The difficulty arises because the court has set no standard test for this qualified privilege. There are sound policy reasons for having a good faith *official* immunity. As the Supreme Court said in *Scheuer v. Rhodes*:

Implicit in the idea that officials have some immunity . . . absolute or qualified . . . for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.⁶²

The rationale supporting a qualified municipal immunity is based on discredited common law history, and had been subject to a great deal of criticism.⁶³ The fact that at least 35⁶⁴ jurisdictions, including Wyoming, have abolished municipal immunity argues strongly against the Supreme Court establishing a municipal immunity for Section 1983 actions. A better approach would be for the Supreme Court to state at its first opportunity that no municipal immunity survives. If the court wishes some form of immunity to exist it

59. *Monell*, *supra* note 8, at 2047 n. 9 (J. Powell, concurring).

60. *Monell*, *supra* note 2.

61. *Cleveland Board of Ed. v. LaFleur*, *supra* note 3.

62. *Scheuer v. Rhodes*, 416 U.S. 232, 241-242 (1974).

63. ADMINISTRATIVE LAW, *supra* note 57, at § 25.00 (Supp. 1970).

64. *Oroz v. Board of County Commissioners of Carbon County*, *supra* note 55, at 1157.

must define the appropriate standard so as to provide some guidance to the lower courts.

CONCLUSION

Monell is a dramatic step towards increasing the accessibility of the courts to Section 1983 litigants. By overruling *Monroe*⁶⁵ and abolishing municipal immunity *Monell* removes stumbling blocks that have stymied civil rights actions. By eliminating artificial procedural barriers and the fictional inquiry into the "person status", *Monell* says that Section 1983 actions should be tried on their merits.

Monell does not appear to affect the status of a qualified official immunity but it does leave unclear the extent of liability that the Court intends for municipalities to assume. On the basis of the *Monell* language, a lower court determining municipal liability will have to make a detailed inquiry into the relationship between an official's actions and the policies that motivate that action.

The Supreme Court leaves unaddressed the question of whether a good faith immunity for municipalities should still exist. In the face of the rejection by the majority of jurisdictions of municipal immunity the Court should avoid creating a good faith municipal immunity standard for Section 1983 actions. The Court should act promptly to dispel the idea that municipalities enjoy a qualified good faith privilege or at least provide some guidance to the lower courts as to the appropriate standard.

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65. *Monroe v. Pape*, *supra* note 4.