GOVERNMENTAL LIABILITY UNDER 1983
Maybe You Really Can't Fight City Hall

Prepared By:

WILLIAM S. HELFAND

Presented By:

NORMAN RAY GILES
Chamberlain, Hrdlicka, White, Williams & Martin
1200 Smith Street, Suite 1400
Houston, Texas 77002
(713) 658-1818
www.chamberlainlaw.com

State Bar of Texas
18TH ANNUAL SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE
July 13 – 14, 2006
San Antonio

CHAPTER 22

WILLIAM S. HELFAND

William "Bill" Helfand is one of the leading civil trial lawyers in Texas with a strong concentration, and record of success, in the federal district and appellate courts throughout Texas and the United States. Bill has tried well over 125 cases to juries and has also conducted many bench trials and arbitrations with a remarkable record of success.

Bill attended Tulane University School of Arts and Sciences where he obtained an undergraduate degree with majors in sociology and psychology. While attending college and law school, he served as a civilian paramedic and, later, a commissioned police officer for the City of New Orleans Police Department. As a police officer, Bill worked patrol, traffic enforcement and investigation, and in the special operations division. Bill graduated Tulane University School of Law with honors and then came to Houston to enter private practice.

Bill's practice in the area of governmental liability concentrates on the defense of public entities, officials and employees of all types throughout Texas and the United States. He has worked in these areas of law for almost twenty years and has been called upon to advise and defend governmental entities, their officials and employees in practically ever subject of potential liability.

Bill is actively involved in civil rights and governmental liability training as well as training of governmental officials and employees. He is frequently asked to speak on behalf of the Texas State Bar, Texas Municipal League, Texas Council Risk Management Fund, Texas Water Authorities Risk Fund and has served an adjunct instructor for Sam Houston State University’s law enforcement and corrections management professional development programs. He has also worked with Sam Houston State University and the Texas Commission on Law Enforcement Standards and Education in the development of web-based training for Texas police officers on constitutional issues and has provided training assistance to the FBI National Academy Associates Program as well as the Law enforcement Television Network.

He has frequently been sought out as an expert and asked to comment on labor, employment, civil rights, law enforcement and education law issues by media agencies of all types including ABC News, AP, USA Today, Education Weekly, The Houston Chronicle, UPI and numerous other local television and radio stations, newspapers and talk shows.

Bill is a shareholder with the firm of Chamberlain Hrdlicka where he supervises the firm's labor and employment and civil rights litigation group from the firm's Houston office.

NORMAN RAY GILES

Norman Giles is an attorney practicing in the litigation section of Chamberlain, Hrdlicka, White, Williams & Martin in Houston. Norman works closely with Bill Helfand in the area of governmental liability primarily concentrating on the defense of public entities and governmental officials. Norman practices in state and federal trial and appellate courts throughout Texas and has handled many civil rights cases. Norman has worked in these areas of law since graduating from South Texas College of Law.

Norman joined the practice of law after retiring from the Galveston Police Department where he achieved the rank of lieutenant. Norman still holds a master peace officer certification and is licensed by the Texas Commission on Law Enforcement Standards and Education as a peace officer instructor and peace office firearms instructor. During his law enforcement career, Norman served as an administrator, supervisor, investigator and patrol officer. Norman has conducted hundreds of investigations including forty homicide investigations and has testified as a witness before many juries as both a fact witness and expert on law enforcement related issues. This background provides him keen insight into civil rights issues which frequently involve law enforcement officers.

TABLE OF CONTENTS

I. Introduction 1

II. Governmental Liability Attaches Only in the Case of a Constitutional Violation 1

III. What Is a Government "Policy" or "Custom?" 1

A. Few Governmental Polices are Actionable 3

1. Facially Unconstitutional Policies 3

2. Unconstitutional Acts of Policymakers 3

3. Unconstitutional Conduct Based Upon Governmental Deliberate Indifference 4

B. Must Prove "Deliberate Indifference" 4

1. Actual or Constructive Knowledge 5

2. Attribution to the Policymaker 5

3. Causal Link Still Required 5

IV. Identification of the Policymaker 7

A. Governing Body is Usually the Policymaker 8

B. Some Questions Remain, at Least as to Cities 8

C. Elected Officials are Usually Policymakers at the County Level 9

V. CONCLUSION 9

TABLE OF AUTHORITIES

Federal Cases

Benavides v. County of Wilson,
955 F.2d 968, 972-73 (5th Cir. 1992) 7

Bennett v. City of Slidell,
728 F.2d 762 (5th Cir.)(en banc), cert. denied, 472 U.S. 1016 (1985) 2, 3, 9

Bennett v. Pippin,
74 F.3d 578, 586 (5th Cir. 1996) 9

Berry v. McLemore,
670 F.2d 30 (5th Cir. 1982) 7

Brady v. Fort Bend County,
145 F.3d 691 (5th Cir.) cert denied, 525 U.S. 1105 (1999) 4, 9

Board of County Com'rs of Bryan County, Okl,
520 U.S. 397, 117 S.Ct. 1382 (1997) 3, 4, 6

City of Canton v. Harris,
49 U.S. 378, 390, 109 S.Ct. 1197, 1205 (1989) 4, 6

City of Los Angles v. Heller,
475 U.S. 796, 811, 106 S.Ct. 1571, 1573 (1986) 1

City of Oklahoma v. City of Tuttle,
471 U.S. 808, 105 S.Ct. 2427 (1985) 5

City of St. Louis v. Praprotnik,
485 U.S. 112, 108 S.Ct. 915 (1988) 8

Connor v. Travis County,
209 F.3d 794, 798 (5th Cir. 2000) 7

Coon v. Ledbetter,
780 F.2d 1158, 1161 (5th Cir. 1986) 6

DeLeon v. City of Haltom City,
106 Fed. Appx. 909, 2004 WL 1777357 (5th Cir. 2004) 5

Estate of Davis, ex rel. McKully v. City of North Richland Hills,
406 F. 3d 375, 386 (5th Cir. 2005) 7

Gabriel v. City of Plano,
202 F.3d 741, 745 (5th Cir. 2000) 5

Gonzales v. Westbrook,
118 F.Supp.2d 728, 237-38 (W.D. Tex. 2000) 7

Grandstaff v. City of Borger,
767 F.2d 161 (5th Cir. 1985) 6

Grandstaff v. Borger,
779 F.2d 1129, 1130 (5th Cir., 1986) 7

Gronowski v. Spencer,
424 F.3d 285 (2nd Cir. 2005) 4

Gros v. City of Grand Prairie,
181 F.3d 613, 617 (5th Cir. 1999) 8

Gros v. City of Grand Prairie,
2000 WL1842421 (N.D. Tex. 2000) 8

Gros v. City of Grand Prairie,
34 Fed. Appx. 150, 2002 WL 494002 (5th Cir. 2002) 9

Hinshaw v. Doffer,
785 F.2d 1260, 1262 (5th Cir. 1986) 7

Holland v. City of Houston,
41 F.Supp.2d 678, 707 (S.D. Tex. 1999) 7

Huong v. City of Port Arthur,
961 F.Supp.2d 1003, 1007 (E.D. Tex. 1997) 7

Jett v. Dallas Independent School Dist.,
491 U.S. 701, 109 S.Ct. 2702 (1989) 8, 9

Jett v. Dallas Independent School Dist.,
7 F.3d 1341 (5th Cir. 1993) 8

Kostrzewa v. City of Troy,
247 F.3d 633 (6th Cir. 2001) 3

Lord v. Larsen,
2005 WL 2041723 (N.D. Tex. 2005) 7

McKee v. City of Rockwall,
877 F.2d 409, 414 (5th Cir.) cert. denied, 493 U.S. 1023 (1990) 1

Monell v. Dep't of Social Services of City of New York,
436 U.S. 658, 690-91, 98 S.Ct. 2018, 2036 (1978) 1

Pembaur v. City of Cincinnati,
475 U.S. 469, 106 S.Ct. 1292 (1986) 3, 4, 8

Pineda v. City of Houston,
291 F.3d 325, 328 (5th Cir. 2002) 1, 3, 5

Piotrowski v. City of Houston,
237 F.3d 567, 578 (5th Cir. 2001) ..... passim

Snyder v. Trepagnier,
142 F.3d 791, 796 (5th Cir. 1998) 5

Tharling v. City of Port Lavaca,
329 F.3d 422, 427 (5th Cir. 2003) 8

Thompson v. Upshur County,
245 F.3d 447, 463 (5th Cir. 2001)..... 5

Turner v. Upton County,
915 F.2d 133, 136 (5th Cir. 1990)..... 9

U.S. Cold Storage, Inc. v. City of Lumberton,
34 Fed. Appx. 429, 434,(4th Cir. 2002)..... 9

Webster v. City of Houston,
735 F.2d 838 (5th Cir. 1984) (en banc)..... 2, 5, 7

State Cases

Manta Management Corp. v. City of San Bernardino,
____ Cal. Rptr. 3d ____, 2006 WL 1281077 (Cal. App. [4th Dist.] 2006)..... 3

GOVERNMENTAL LIABILITY UNDER 1983 – *Maybe You Really Can't Fight City Hall*

I. Introduction

In an era in which the application of so many federal statutory causes of action are fairly clear-cut, it is worth noting that, less than thirty years ago, the United States Supreme Court grappled with the question of whether units of local government could be sued under 42 U.S.C. § 1983. As most are now aware, the *Monell* Court found that local governmental units were "persons" for purposes of actions under 42 U.S.C. § 1983 but tempered that finding by holding that local governments could not be held liable under a theory of *respondeat superior* but, rather, only when a constitutional deprivation arises from a governmental "custom." In so finding, the *Monell* Court expressly held that local governments;

> by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels.[1]

However, the Supreme Court's *Monell* decision mandated more in the consideration of the imposition of liability against a governmental entity for allegedly unconstitutional acts and, indeed, one could reasonably argue that, in deciding *Monell* – a case of clear governmental policy relating to required leaves of absences of public employees while pregnant – the Supreme Court never envisioned its *Monell* decision to be the basis of a springboard for liability for the alleged individual misconduct of governmental employees, particularly law enforcement officers. In fact, although so many courts may feel as though they have moved beyond the *Monell* decision as the guidepost of potential liability of governmental entities, a return to the simple language of *Monell* is quite helpful in analyzing potential governmental liability in so many cases which continue to be filed today, particularly when one considers the causation element contained within the Supreme Court's *Monell* decision:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicting solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those who edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

Monell, 436 U.S. at 694, 98 S.Ct. at 2037-2038.

Over the past approximately thirty years, the courts, and practitioners, have grappled with the attempt to distinguish between injuries inflicted by governmental employees or agents and those "when execution of a government's policy or custom … inflicts the injury." This paper attempts to serve as a discussion of the development of the law in this area and to focus particularly on the current status of Supreme Court and Fifth Circuit jurisprudence which allows a reasoned analysis of when, among the substantially fewer cases, a governmental entity is a proper party to a § 1983 claim.

II. Governmental Liability Attaches Only in the Case of a Constitutional Violation

At the very outset, it is essential to remember that, consistent with *Monell*, an actual constitutional injury must occur to a plaintiff in order for that plaintiff to have a cause of action against anyone, including a governmental entity. Accordingly, courts consistently look first to determine whether a constitutional violation has occurred, before even considering whether the city's policies are constitutional. Where a plaintiff is not a victim of any constitutional violation, it is irrelevant whether any governmental policy authorized conduct of which the plaintiff complains.[2] Accordingly, a plaintiff must first identify actual unconstitutional conduct, and a real injury resulting therefrom, before he or she can sue a governmental entity. If a plaintiff was not the victim of a constitutional deprivation, it is of no moment that he or she may point to an allegedly unconstitutional policy of the city.[3]

III. What Is a Government "Policy" or "Custom?"

In the first few years after *Monell*, courts grappled with the question of what constituted a governmental policy sufficient to impose liability upon a governmental unit consistent with the Supreme Court's

[1] *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2036 (1978).

[2] *City of Los Angles v. Heller*, 475 U.S. 796, 811, 106 S.Ct. 1571, 1573 (1986). *Accord, McKee v. City of Rockwall*, 877 F.2d 409, 414 (5th Cir.) cert. denied, 493 U.S. 1023 (1990).

[3] *C.f., Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002).

Monell decision. This confusing period was likely the result of the unintended consequences of the Supreme Court's use of the term "custom," as opposed to express policy, in *Monell*. Again, in *Monell*, the Supreme Court was dealing with what it easily characterized as an undisputedly governmentally created policy relating to forced leave for pregnant employees. However, in applying the *Monell* decision, courts were called upon to grapple with the concept of much more difficult factual scenarios in which an alleged constitutional deprivation at the hand of individual governmental employees was claimed to have been the result of a governmental "custom."

This issue likely reached its zenith in the Fifth Circuit less than ten years after *Monell* when the Fifth Circuit considered the issue *en banc* in *Webster v. City of Houston*.[4]

After a dangerous, lengthy, high-speed chase, the Houston Police stopped a stolen van driven by a seventeen year old unarmed individual. When the young man exited the van, he was promptly hit and physically abused by at least two Houston police officers. In the scuffle, one of the officer's pistols discharged and the injuries to the suspect ultimately caused his death. Because the suspect was unarmed, and there was arguably no basis for the use of deadly force, a fellow officer provided a "throw down" weapon to place next to the suspect's body in order to make it appear as though he had been armed at the time he was shot. All of the police officers who were at the scene, and who later gave statements regarding the incident, falsely declared that the suspect was armed when he was shot. The City's internal investigation exonerated the officers in spite of the statement of at least one first-hand witness, a cab driver, that the suspect was unarmed. Later, after a federal investigation, the true story was revealed and the decedent's parents brought suit against the individual police officers and the City of Houston under 42 U.S.C. § 1983.

Realizing, perhaps, that the Plaintiffs could not demonstrate that the actual discharge of the weapon was caused by a City policy, the Plaintiffs sought instead to impose liability upon the City based upon the argument the City was liable because of its tolerance of what it knew, or what the Plaintiffs argued it had to have known, was one of involving the use of throw down weapons to excuse otherwise unauthorized uses of deadly force.

In considering the trial court's instructions to the jury, that they could find the City liable based upon proof that the City maintained a custom of using excessive police force that caused the suspect's death, the trial judge instructed the jury that they could find the City maintained such a custom "through its high-ranking officials," whom the Court defined as the Mayor, City Council, the Police Chief or some similarly ranked official whose acts may fairly be said to represent official policy.

The *en banc Webster* Court utilized the case to enunciate a more clear cut definition of official policy than that which had previously had been applied and, as the *Webster* Court observed, that had been applied by the trial court. Specifically, the Webster Court, sitting *en banc*, held that official policy is:

> 1. A policy, statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
> 2. A persistent, widespread practice of city officials or employees which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributed for the governing body of the municipality or to an official to whom that body has delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.[5]

Notably, the Webster Court introduced further refinements to the basis for imposition of governmental liability in light of the Court's panel decision in *Bennett v. City of Slidell*, which later resulted in *en banc* consideration and a more clear definition of the role of official policy, as defined by the *Webster* Court, in determining the basis for limited circumstances in which governmental liability may exist under §1983.[6]

In *Bennett*, incorporating the recently refined definition of official policy, the Fifth Circuit went further to enunciate a three step requirement for governmental liability under §1983:

[4] 735 F.2d 838 (5th Cir. 1984) (*en banc*).

[5] *Webster*, 735 F.2d at 841.

[6] *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir.)(*en banc*), cert. denied, 472 U.S. 1016 (1985).

1. An official policy or custom, of which;

2. A policymaker can be charged with actual or constructive knowledge, and;

3. A constitutional violation whose "moving force" is that policy or custom.

Bennett, 728 F.2d at 767.[7] Accordingly, the Fifth Circuit, as well as others, have generally held, since *Bennett*, that, in order to support a claim against a governmental entity, a plaintiff must adduce evidence which identifies a policy or custom of which he complains, which he can connect to the governmental entity itself, and which shows that a particular constitutional injury was suffered because of the actual execution of that specific government policy or custom.

Later, the Supreme Court, in *Board of County Com'rs of Bryan County, Okl v. Brown*,[8] an appeal from the Fifth Circuit, essentially adopted the Fifth Circuit's definition of policy as set forth in *Webster*. Accordingly, the first step to attempting to establish governmental liability on a claim under §1983 requires that the plaintiff identify a governmental policy or custom which he can ultimately show caused a constitutional violation.[9]

A. Few Governmental Polices are Actionable

The jurisprudence regarding policies which may lead to governmental liability, where the operation of the policy was the "moving force" behind an alleged violation, have essentially taken three courses. Accordingly, in considering the issue of governmental liability, whether for a plaintiff or defendant, it is important for the parties and the court to consider which type of governmental "policy" is allegedly at issue.

1. Facially Unconstitutional Policies

Monell, and *very few other cases*, exemplify the rare circumstance in which the governmental policymaker has created an express policy which, on its face, violates constitutional rights.

Such was the case when *Monell* was decided but such circumstances are even rarer today in the face of significant jurisprudential definition of the parameters of constitutional rights, more rigorous governmental training, particularly in the area of law enforcement and more introspective governmental policymaking. However, some cases do continue to occasionally crop up based upon their own unique facts. Recent examples include city liability for enforcing a facially unconstitutional ordinance.[10] And, where a police department's policy required that all detainees be handcuffed during transport, regardless of the circumstances, and "even if injury was substantially likely to result" from the handcuffing, the Sixth Circuit Court of Appeals found such a policy could be facially unconstitutional thereby subjecting the City to governmental liability.[11] Obviously, the decision of whether an express policy is constitutional is a question of law.

2. Unconstitutional Acts of Policymakers

The second area of unconstitutional conduct which may visit liability upon a governmental entity are the unconstitutional acts of the policymaker(s) themselves, even when the policymaker engages in only a single incident upon constitutional conduct. The watershed case in this regard is the Supreme Court's opinion in *Pembaur v. City of Cincinnati*.[12]

In *Pembaur*, sheriff's deputies attempted to serve a capias warrant on clinic employees. Pembaur, a doctor barred the door to his clinic and refused to let the officers enter. The deputies conferred with an assistant prosecutor who, after speaking with the county prosecutor himself, instructed the deputies to "go in and get" the doctor and his employees. After the deputies tried unsuccessfully to force the door open, city police officers obtained an axe and chopped down the door. The deputies then entered and searched the clinic but were unable to locate the employees whom they sought. Doctor Pembaur filed a § 1983 action against, *inter alia*, the City of Cincinnati. The trial court dismissed claims against the county on the ground that the individual officers were not acting pursuant to the kind of "official policy" which is required the predicate municipal liability against a governmental entity. The court of appeals affirmed because the incident constituted a single occasion of unconstitutional conduct. The Supreme Court reversed and identified a second basis for satisfying *Monell's* policy requirement where the federal constitution or federal law has been violated by an act of the policymaker itself. The Supreme Court held that, under such circumstances:

> the choice of policy and its implementation are one and the first or only action suffices to

---

[7] *See also Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) and *Pineda* 291 F.3d at 328.

[8] 520 U.S. 397, 117 S.Ct. 1382 (1997).

[9] *Piotrowski*, 237 F.3d at 578.

[10] *Manta Management Corp. v. City of San Bernardino*, ____ Cal. Rptr. 3d ____, 2006 WL 1281077 (Cal. App. [4th Dist.] 2006).

[11] *Kostrzewa v. City of Troy*, 247 F.3d 633 (6th Cir. 2001)

[12] 475 U.S. 469, 106 S.Ct. 1292 (1986).

> ground municipal liability simply because it is the very policymaker who is acting.

Pembaur. [13]

As in the case of facially unconstitutional policies, unconstitutional conduct by the policymaker itself is rare. Arguably, considering the teachings of *Pembaur* and its progeny, it should be even rarer than it actually is. However, particularly in the case of small cities and counties, where policymakers are actively involved in both policymaking and implementation, such claims still arise. A recent, and common example, is demonstrated by the case of *Gronowski v. Spencer.*[14] In *Gronowski*, the court of appeals upheld a jury verdict that found that the mayor of the City of Yonkers had personally acted unconstitutionally when he laid off a city clerk in retaliation for the clerk's exercise of free speech rights. A less recent, but certainly as compelling, example is found in the Fifth Circuit's opinion in *Brady v. Fort Bend County,*[15] also a political retaliation case.

It is important to note that, although these types of cases still exist, and can be located through diligent search, they remain relatively few and far between and are not generally the basis of governmental liability. When they are presented, the basis of liability – the unconstitutional act of a defined policymaker – should be readily identifiable, both as to the unconstitutionality of the conduct as well as the identification, under the law, of the actor as a policymaker.

Indeed, the mere presence or involvement of an alleged policymaker at the scene of an incident may not, in and of itself, result in a basis for governmental liability, even for unconstitutional acts of other individuals, such as other police officers. The basis for liability under *Pembaur* and its progeny still requires proof that the policymaker actually causes, or is the moving force behind, a demonstrable constitutional violation.

3. Unconstitutional Conduct Based Upon Governmental Deliberate Indifference

The final, and most prevalent basis for the assertion of, although no more prevalent a basis for finding, a municipal policy as the cause of a constitutional deprivation is the situation in which a policymaker has failed to act affirmatively where the need to take some action to control the government agents;

> is so obvious in the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymake[r] . . . can reasonably said to have been deliberately indifferent to the need.[16]

As in *City of Canton v. Harris,* these types of claims are often advanced in connection with claims of unconstitutional deliberate indifference to inadequate training or supervision. However, it is important to note that, although often pled, these claims are rarely successful, particularly as to training in states, such as Texas, where there is state mandated minimum training to which local governmental entities must adhere. Indeed, the plaintiffs' practitioner is well advised to recall that, even in *City of Canton v. Harris*, the Plaintiff, after persuading the Supreme Court to adopt the concept of inadequate training as a potential basis for governmental liability, ultimately failed to prevail on the claim.

B. Must Prove "Deliberate Indifference"

These claims, although often advanced, usually fail because of the requirement of a showing of deliberate indifference in order to prevail. In order to establish liability against a governmental unit, based upon an allegation that a facially constitutional government policy caused a constitutional violation, a plaintiff must prove the relevant governmental policy or custom at issue was "promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result" from otherwise constitutional policy.[17] Indeed, in *Bryan County v. Brown*, the Supreme Court reiterated the significance of proof of deliberate indifference where a plaintiff seeks to establish governmental liability based upon a facially constitutional municipal policy by pointing out the numerous opinions in which the Supreme Court has held fast to the requirement of proof of literal deliberate indifference by municipal policymakers.[18] This is why claims that an individual *violated* governmental polic(ies) in perpetrating alleged constitutional violations fail, as a matter of law, as they are antithetical to a claim of deliberate governmental indifference.

Notably, as these claims have proliferated to the point that they seem practically rote, the Supreme Court and Fifth Circuit have repeatedly enunciated the

---

[13] 475 U.S. at 480-81, 106 S.Ct. at 1298-99.

[14] 424 F.3d 285 (2nd Cir. 2005).

[15] 145 F.3d 691 (5th Cir.) cert denied, 525 U.S. 1105 (1999)

[16] *City of Canton v. Harris*, 49 U.S. 378, 390, 109 S.Ct. 1197, 1205 (1989).

[17] *Piotrowski*, 237 F.3d at 579, *quoting Board of Com'rs of Bryan County, Oklahoma v. Brown*, 520 US. at 407, 117 S.Ct. at 1389-90.

[18] *Brown*, 520 U.S. at 417-419, 117 S.Ct. at 1394-1396.

basic proposition that it is nearly impossible for a plaintiff to establish deliberate indifference, sufficient to state a claim against a governmental entity, on the basis of a single incident.[19] This is due to the fact that, for over twenty years, the Supreme Court has subscribed to the proposition that, in the absence of a facially unconstitutional municipal policy, proof of a single instance of unconstitutional activity is simply not sufficient to impose § 1983 on a City under *Monell.* To show "deliberate indifference," in the case of a facially constitutional policy, more proof than a single incident is required in every case to establish both the requisite fault on the part of the municipality and the causal connection required by *Monell* between the "policy" and the alleged constitutional deprivation.[20] The Fifth Circuit, in accord, has held that, even where an isolated constitutional deprivation actually occurs, deliberate indifference cannot be established nor inferred from such a single incident.[21]

At bottom, therefore, the Fifth Circuit has held that, in order to hold a municipality liable under § 1983 based upon a claim of deliberate indifference, a plaintiff must demonstrate that a policymaking governmental official has knowledge of an alleged unconstitutional custom, and is deliberately indifferent to the unconstitutional effects of an otherwise facially constitutional policy.[22]

1. Actual or Constructive Knowledge

> Actual knowledge may be shown by such means as discussions at council meetings or receipt of written information. Constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations as they properly exercised its responsibilities, as for example, where the violations were so widespread that they were subject to prolonged public discussion or of a high degree of publicity.[23]

The Fifth Circuit has generally rejected claims of attribution of knowledge to governmental policymakers through any other means.

2. Attribution to the Policymaker

Importantly, as the courts have refined the concept of attribution to the policymaker for a deliberate indifference claim, they have further refined the identification of the policymaker. Specifically, the law has developed away from the instruction provided by the trial court in *Webster* to more carefully identify the policymaker in accordance with subsequent Supreme Court and Fifth Circuit precedent. Therefore, today, vague attributions of knowledge to unidentified individuals in management, or individuals otherwise within the chain of command, who are not statutorily defined policymakers, are insufficient to establish constructive knowledge against the municipality and therefore, are insufficient to provide a basis for governmental liability under § 1983.[24] One recent example of the significance of identifying conduct of the policymaker itself is the rejection of an attribution of liability to a City where individual council members, but not the City Council itself, were alleged to have been involved in conduct leading to constitutional deprivations.[25]

Ultimately, it may be helpful to understand that allegations of governmental liability premised upon deliberate indifference are allegations that the government *failed to adopt a policy* in order to address unconstitutional conduct perpetrated under existing, facially constitutional policies, *of which the statutorily defined policy maker is actually or constructively aware.* When considered in this light, it is easier to see why so many cases alleging deliberate indifference relating to training and supervision, particularly, typically fail. Stated differently, to support a claim of §1983 liability against a governmental entity, a plaintiff must prove that a governmental entity actually made a decision which allows the conduct of employees to violate the constitution, with knowledge of the effect of such a decision.[26]

3. Causal Link Still Required

Moreover, it is not sufficient simply to identify deliberate indifference on the part of a governmental entity but, having done so, the plaintiff must still establish a causal link between the allegedly deliberately indifferent conduct and the constitutional deprivation itself. The Supreme Court has explained that;

> it is not enough for a §1983 plaintiff merely to identify conduct properly attributable to

[19] *See Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2000).

[20] *City of Oklahoma v. City of Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985).

[21] *Thompson v. Upshur County*, 245 F.3d 447, 463 (5th Cir. 2001), *citing, Webster v. City of Houston*.

[22] *Pineda,* 291 F.3d at 330.

[23] *Id.*

[24] *Id.*

[25] *See DeLeon v. City of Haltom City*, 106 Fed. Appx. 909, 2004 WL 1777357 (5th Cir. 2004).

[26] *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998).

> the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged.[27]

Therefore, to subject a municipality to liability under § 1983 "[i]in addition to culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation."[28]

a. Claims of Deliberate Indifference to Training Needs

It seems almost rote at this point that attempts to establish governmental liability, particularly for the allegedly unconstitutional conduct of law enforcement officers, include allegations of unconstitutionally deficient governmental training programs.

In considering an allegation of constitutionally deliberate indifference to a known need for training, it is important to recall the Supreme Court's holding, through Justice O'Conner's opinion, in *City of Canton v. Harris*:

> That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the City, for the officer's shortcomings may have resulted from factors other than a faulty training program.[29]

It is equally important to recall Justice O'Conner's opinion for the Court that:

> [n]either will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.[30]

Notably, even under the difficult facts presented in *Grandstaff v. City of Borger,*[31] the Fifth Circuit has generally eschewed allegations of inadequate training as a basis of § 1983 liability against a governmental entity, holding that;

> an 'inadequate training program alone is not ordinarily the moving force behind an injured plaintiff's harm, because the police officer who injures the plaintiff does not rely upon inadequate training as tacit approval of his conduct.' It is not enough that the City could but does not, reduce the risk of harm to the plaintiff.[32, 33]

In light of Supreme Court and Fifth Circuit teaching regarding the rare circumstances in which a plaintiff may succeed in asserting claims of unconstitutional deliberate indifference to a known need for training, it is not surprising that such claims are practically never availing in Texas, in the context of law enforcement liability, considering Texas' statutory requirements for law enforcement training.

Indeed, the Fifth Circuit Court of Appeals has rendered numerous decisions which, although not expressly so declaring, have generally acknowledged the proposition that a governmental entity's compliance with state-mandated minimum training requirements for an individual alleged to have violated constitutionally protected civil rights precludes a claim of constitutionally inadequate training as a matter of law.[34] Accordingly, and even though the Circuit Court has yet to expressly do so, numerous Texas district court opinions have expressly adopted the proposition that a plaintiff cannot, as a matter of law, sustain a failure to train or inadequate training claim under § 1983 against a governmental entity if the governmental body can demonstrate it has complied with

---

[27] *Brown*, 520 U.S. at 404, 117 S.Ct. at 1388.

[28] *Piotrowski*, 237 F.3d at 579.

[29] *City of Canton v. Harris*, 49 U.S. at 390-91, 109 S.Ct. at 1206.

[30] *Id.,* 49 U.S. at 391, 109 S.Ct. at 1206.

[31] 767 F.2d 161 (5th Cir. 1985).

[32] *Id.* at 169 (collecting cases).

[33] At this point, it worth pointing out that, although *Grandstaff* is often cited by plaintiffs as a basis for municipal liability in many law enforcement liability cases, its holding has been restricted to its own unique set of facts and it has generally been rejected as having any precedential value relating to the imposition of liability against governmental entities in other litigation. *C.f., Coon v. Ledbetter*, 780 F.2d 1158, 1161 (5th Cir. 1986) ("*Grandstaff* affirmed a judgment against this Texas city on a highly peculiar set of facts . . . the *Grandstaff* panel emphasized the extraordinary facts of the case and its analysis can only be applied to equally extreme factual situations.") The number of reported opinions which have recognized the inapplicability of *Grandstaff's* holding as it relates to governmental liability in practically any other case exceeds twenty-five reported opinions of the Fifth Circuit and district courts of this Circuit.

[34] *Benavides v. County of Wilson*, 955 F.2d 968, 972-73 (5th Cir. 1992) and *Connor v. Travis County*, 209 F.3d 794, 798 (5th Cir. 2000).

state-mandated minimum training requirements for its officers.[35]

If recent filings are any indication, it is easy for a plaintiff to allege unconstitutionally inadequate training as a potential basis of liability against a governmental entity. However, a review of Fifth Circuit and Texas district court decisions demonstrate that such claims rarely advance beyond the motion to dismiss or motion for summary judgment phase.

b. Failure to Supervise

A review of current pleadings demonstrates that failure to train and failure to supervise claims seem to go hand-in-hand and they are often analyzed together by the courts. Both are considered under the same deliberate indifference theory. However, in the context of supervision, at least in Texas, there is no overriding state-mandated program which may completely preclude such claims based upon minimum compliance. Accordingly, failure to supervise claims continue to find, if not ultimate results in governmental liability, longevity beyond most failure to train claims.

Accordingly, in, for example, *Lord v. Larsen,*[36] the trial court denied, in part, the City of Dallas' motion for summary judgment based upon the plaintiff's claim and evidence, in the opinion of the court, sufficient to overcome summary judgment, that the city failed to adequately supervise its narcotics officers and their use of confidential informants. However, again, most of these claims, like allegations of unconstitutionally deficient training programs fail to proceed past the dispositive motion phase.

To prevail on a claim of unconstitutionally deliberate indifference to a need for supervision, under § 1983, a plaintiff must adduce evidence showing; (1) a supervisor failed to supervise an officer; (2) a causal connection between a failure to supervise a subordinate and a violation of plaintiff's constitutionally protected rights; and (3) such failure to supervise amounted to deliberate indifference.[37] Again, since claims of deliberate indifference cannot be predicated on a single event, it is noteworthy that the Fifth Circuit has repeatedly held that; "it is nearly impossible to impute lax disciplinary policy to the [governmental entity] without showing a pattern of abuses that transcends the error made in a single case." [38]

Similarly, and logically, a post-event failure to discipline an officer "cannot supply the necessary linkage to establish City policy" of insufficient supervision.[39] Stated differently, "[a]n after-the-fact failure to discipline illegal conduct is by itself no evidence of before-the-fact policy of illegal conduct."[40] Obviously, after-the-fact conduct of a governmental entity could not be the moving force behind a constitutional violation which occurred before the governmental entity had an opportunity to act. However, it may form the basis of knowledge of unconstitutional conduct generally, in order to address the question of governmental deliberate indifference in connection with future, similar, events.

Lastly, again, as with training, the courts have generally rejected the argument that more or different supervision might have prevented the occurrence as a basis for governmental liability. As discussed in the context of training, the courts have recognized this argument, which can always be made, is simply not sufficient to establish governmental liability because, in practically every circumstance where a person has had his or her constitutional rights violated by a governmental employee, a § 1983 plaintiff would be able to allege that something the municipality *might* have done *might* have prevented the unfortunate incident. This allegation is simply insufficient to impose liability for alleged unconstitutionally deliberate indifference to a known need for supervision.[41]

IV. Identification of the Policymaker

In *Monell*, and its early progeny, the Supreme Court and circuit courts declined to adopt a precise definition of "policymaker" for purposes of fixing governmental liability. The Supreme Court eventually recognized it had not adequately defined the mechanism of determining which municipal officials have "final policymaking authority," in order for their actions to subject the government to § 1983 liability, even though the Court had generally addressed the four elements of the requirements for imposing municipal liability for unconstitutional acts of municipal policymakers in its prior decision in *Pembaur*.

Specifically, in *Pembaur*, the Supreme Court restated the proposition that municipalities may be held liable under § 1983 only for acts which the municipality itself is actually responsible, "that is acts which the municipality has official sanctioned or

---

[35] *C.f., Huong v. City of Port Arthur*, 961 F.Supp.2d 1003, 1007 (E.D. Tex. 1997); *Holland v. City of Houston*, 41 F.Supp.2d 678, 707 (S.D. Tex. 1999) and *Gonzales v. Westbrook*, 118 F.Supp.2d 728, 237-38 (W.D. Tex. 2000).

[36] 2005 WL 2041723 (N.D. Tex. 2005).

[37] *Hinshaw v. Doffer*, 785 F.2d 1260, 1262 (5th Cir. 1986).

[38] *Piotrowski*, 237 F.3d at 582. *Accord*, *Webster v. City of Houston*, 735 F.3d at 851 and *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982)(overruled on other grounds).

[39] *Grandstaff v. Borger*, 779 F.2d 1129, 1130 (5th Cir., 1986), dissenting opinion on denial of rehearing *en banc*.

[40] *Id*.

[41] *C.f., Estate of Davis, ex rel. McKully v. City of North Richland Hills*, 406 F. 3d 375, 386 (5th Cir. 2005).

ordered."[42] Second, the *Pembaur* Court reiterated that only those municipal officials who have "final policymaking authority" may by their actions, subject the government to § 1983 liability.[43] Third, the *Pembaur* Court held that, whether a particular official has "final policymaking authority" is a question of state law and, fourth, that the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy *in that area* of the governmental entity's business.[44] In *City of St. Louis v. Praprotnik,*[45] the Supreme Court observed that the courts of appeals, in the few years after the *Pembaur* opinion was issued, had already diverged in their interpretations of these guiding principles.

In *Praprotnik*, the Supreme Court started by reiterating that the identification of a policymaking official is *a question of state law* and, perhaps more importantly, that *the identification of policymaking officials is neither a question of federal law nor a question of fact*.[46] Subsequently, and in accordance with this guiding principle, the Fifth Circuit has held that "the existence of official policymaking authority is a question of law to be decided by the Court."[47] Accordingly, the Fifth Circuit has further held it is error to allow the question of the identification of a governmental policymaker to be submitted to the jury as a question of fact.[48]

A. Governing Body is Usually the Policymaker

Generally, the Fifth Circuit, in considering Texas law, has found that the policymaker for a governmental entity is the elected governing body. An early, and very clear-cut expression of this proposition was the Circuit's holding that only an elected school board, and not even its superintendent, had final policymaking authority in the area of employment issues in *Jett v. Dallas Independent School Dist*.[49] Notably, the Circuit Court made this determination after being instructed to do so, on remand, after the Supreme Court, in considering the issue, expressly rejected the Plaintiff's allegation that policymaking for a Texas school district might reach as low as individual school principals.[50] Both the Supreme Court's holding, and the Fifth Circuit's analysis on remand, would certainly seem to suggest that, even beyond school districts, in Texas the policymaker for a governmental entity is usually the elected governing body. However, despite this early clear precedent, the Fifth Circuit has struggled in some instances, particularly in the area of Texas cities, in spite of the fact that as with the Education Code, Texas statutes clearly define the city council, or in some instances the city manager, as a Texas city's policymaker.

B. Some Questions Remain, at Least as to Cities

Still, in spite of the Supreme Court's significant emphasis on the utilization of *state law* as the sole basis of identifying an appropriate policymaker in each individual case, the Fifth Circuit has encountered some difficulty in identifying bright lines, even though they might be apparent from reference only to, as the Supreme Court dictates, state law.

For example, in *Gros v. City of Grand Prairie, Texas*,[51] two judges of a three judge panel reversed the trial court's dismissal of claims against the city based upon the plaintiff's claim that the chief of police was the city's policymaker for law enforcement policies. Chief Judge Carolyn King dissented and pointed out that both Supreme Court and ample prior Fifth Circuit precedent demonstrated that a chief of police, in a city in Texas, could not, under Texas law, be city's policymaker. Indeed, although this issue was addressed on remand by the district court, which again explained the basis of its holding that the chief of police is not the policymaker under a *Praprotnik* analysis,[52] and although that decision was later affirmed by a different appellate panel, the Circuit Court's original decision still stands for the proposition that a city police chief *may be* a policymaker for purposes of governmental liability in Texas. In addition to the Chief Judge, in her dissenting opinion in *Gros I*, at least one appellate court has recognized the inconsistency of the Fifth Circuit's extant jurisprudence in this regard when measured against prior Fifth Circuit and Supreme Court precedent.[53] As

---

[42] *Pembaur,* 475 U.S. at 480, 106 S.Ct. at 1298.

[43] *Id.* 475 U.S. at 483, 106 S.Ct. at 1300 (plurality opinion).

[44] *Id* 475 U.S. at 483-83, n. 12, 106 S.Ct. at 1299-1300, n. 12 (plurality opinion).

[45] 485 U.S. 112, 108 S.Ct. 915 (1988)

[46] *City of St. Louis v. Praproptnik*, 485 U.S. 112, 124, 108 S.Ct. 915, 924-25 (1988).

[47] *Tharling v. City of Port Lavaca*, 329 F.3d 422, 427 (5th Cir. 2003).

[48] *Gros v. City of Grand Prairie*, 181 F.3d 613, 617 (5th Cir. 1999) (*Gros I)*

[49] 7 F.3d 1241 (5th Cir. 1993)(opinion after remand).

[50] *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 109 S.Ct. 2702 (1989).

[51] *Gros,* 181 F.3d at 617.

[52] *Gros v. City of Grand Prairie*, 2000 WL1842421 (N.D. Tex. 2000)(on remand).

[53] *U.S. Cold Storage, Inc. v. City of Lumberton*, 34 Fed. Appx. 429, 434,(4th Cir. 2002) *citing, Jett v. Dallas*

Chief Judge King pointed out in her dissent, the Circuit's opinion in *Gros I* is difficult to synthesize with prior Fifth Circuit holdings that "policymaking authority is more than discretion, and it is far more than the final say so,"[54] a proposition later adopted by the subsequent panel when *Gros* returned to the Circuit Court.[55] Notably, however, the panel in *Gros III* did not choose to expressly overrule the still open question of whether a chief of police in a Texas city may be a city policymaker for law enforcement policy, as left open for argument in *Gros I*. Still, in light of *Praprotnik* and prior Circuit precedent, it would be reasonable to anticipate that the Circuit Court will likely repudiate this suggestion in a future case.

C. Elected Officials are Usually Policymakers at the County Level

In light of both Texas constitutional provisions and Chapter 85 of the Texas Local Government Code, when it comes to sheriffs, as opposed to chiefs of police, it appears quite clear that the sheriff is the county policymaker for law enforcement policies.[56] Equally, and particularly in light of § 85.003 of the Texas Local Government Code, the Fifth Circuit has conclusively established that the sheriff is the county's final policymaker in the area of employment within in the sheriff's department as well.[57] This is true event where the sheriff's employment policies are contrary to those of the county itself.[58]

V. CONCLUSION

It is simply not a matter of advocacy to suggest that, consistent with Supreme Court and Fifth Circuit precedent, the circumstances under which a governmental may be liable for a constitutional violation perpetrated by one of its employees is extremely narrow. Jurisprudential development over the last thirty years, since *Monell*, and particularly over the last ten years in this Circuit, suggests a certain, and arguably justified, judicial callusing to the practically automatic inclusion of claims of governmental liability where, under clear jurisprudence, it simply does not apply.

While some questions regarding the identification of a policymaker remain open, it is important that counsel recognize the well-settled proposition of law, and position of the Fifth Circuit Court of Appeals, that, consistent with Supreme Court precedent, for a plaintiff to establish liability against a governmental defendant, he must be prepared to demonstrate an official policy or custom, of which an identifiable policymaker can be charged with actual or constructive knowledge and which was the "moving force" behind the constitutional deprivation alleged. As the Fifth Circuit has pointed out, satisfaction of each of these elements "are necessary to distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself."[59] Importantly, practitioners must bear in mind the Fifth Circuit's admonition that "this is not an opaque requirement" and that "[m]istakes in analyzing § 1983 municipal liability cases frequently begin with a failure to separate the three attribution principles and to consider each in light of relevant case law."[60]

The bottom line is that one can fight "city hall" but that a reasonable practitioner must consider when under now ample jurisprudential guidance, city hall should actually be dragged into the fight.

Independent School Dist., 491 U.S. 701, 109 S.Ct. 2702 (1989).

[54] *Bennett*, 728 F.2d at 769.

[55] *Gros v. City of Grand Prairie*, 34 Fed. Appx. 150, 2002 WL 494002 (5th Cir. 2002)(*Gros III*)(affirming District Court's summary judgment in favor of City based upon finding that Chief of Police was not municipal policymaker for City's law enforcement policy.

[56] *C.f., Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996).

[57] *Turner v. Upton County*, 915 F.2d 133, 136 (5th Cir. 1990).

[58] *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir.) cert denied, 525 U.S. 1105 (1999)

[59] *Piotrowski*, 237 F.3d at 578.

[60] *Piotrowski*, 237 F.3d at 578-789.