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DEFENDING CORRECTIONAL MEDICAL LAWSUITS & BEST PRACTICES FOR DEFENSE

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Constitutional Violations

- 42 U.S.C. 1983
- Not the same as medical negligence
- 8th Amendment or 14th Amendment

Prisoners vs. Pretrial Detainees

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Prisoners – 8th Amendment

- Cruel and Unusual Punishment
- *Farmer and Estelle* control
- Objective prong: was the medical need objectively serious
- Subjective prong: was the provider deliberately indifferent

Pretrial Detainees – 14th Amendment

- Due Process
- Circuit Split
- Some circuits use the same 8th Amendment "deliberate indifference"
  - 5th, 8th, 11th Cir
- Some circuits use the "objectively unreasonable" standard that applies to excessive force claims
  - 2nd, 7th, 9th Cir
- Some Circuits haven't decided and continue to use 8th Amendment test for now
  - 4th & 6th

Deliberate Indifference Claims

- Prisoner – convicted of a crime; serving sentence (8th amendment)
- Detainee – in jail awaiting trial or sentencing (14th amendment)
- Post-conviction inmate – in jail following conviction awaiting transfer to prison (8th amendment)
- For our purposes, they are all "*patient*"
- No federal statute of limitations- use the comparable state statute
- Often accompanied by claims of medical malpractice, gross negligence, policy/custom claims, and corporate negligence

Deliberate Indifference Claims

- Two preeminent US Supreme Court cases
  - *Farmer v. Brennan* (1994)
  - *Estelle v. Gamble* (1976)

- These cases lay out the two-pronged standard:
  - Objective prong: was the medical need objectively serious
  - Subjective prong: was the provider deliberately indifferent

- No vicarious liability
  - Individual supervisor must have also intentionally violated rights
  - *Monell* claims for policies and procedures

Serious Medical Need

- Objective Component

- “Beginning with the objective component, a serious ... medical need” is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.” *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008).

- “Similarly, the Ninth Circuit regards a medical condition to be “serious” where the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.” *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997).

Deliberate Indifference Standard

- "the defendants, subjectively aware of the need and its seriousness, nevertheless acted with deliberate indifference to it by declining to secure available medical attention." *Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 104 (4th Cir. 1995) (emphasis added); *see also Makdessi v. Fields*, 789 F.3d 126, 133 (4th Cir. 2015).

- To constitute "deliberate indifference" the medical provider's disregard must have been "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Wooton v. Pumpkin Air, Inc.*, 869 F.2d 848, 851 (5th Cir. 1989)

What is NOT Deliberate Indifference

- Delays in medication administration
- Failure to monitor vitals
- Misdiagnosis
- Difference in opinion over treatment
- Negligence

What is NOT Deliberate Indifference

- Remember:
- Complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim
- Plaintiff needs to prove gross negligence, intentional conduct, or objectively unreasonable conduct (14th Amendment in some Circuits)
- Medical professionals need consent to provide treatment. That includes consent to physically assess the patient, take vitals, etc.

Objectively Unreasonable

- Defendant made an intentional decision with respect to confinement conditions
- Conditions put plaintiff at a substantial risk of suffering serious harm
- **Defendant did not take reasonable available measures to abate risk**
- **Reasonable official in circumstances would have appreciated the high degree of risk involved (the consequences would be obvious)**
- By not taking reasonable measures, defendant caused plaintiff's injuries

Gordon v. Cnty. Of Orange, 888 F.3d 1118, 1124-25 (9th Cir. 2018)

Objectively Unreasonable

- Fact specific inquiry
- Mere lack of due care does not violate due process
- Plaintiff must prove "more than negligence but less than subjective intent—something akin to reckless disregard." *Castro v. Cnty of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016)

Monell Claims – Policies and Procedures

- *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978)

- Plaintiff cannot bring a Section 1983 merely on the basis of vicarious liability/respondeat superior

- Need to prove an official policy or unofficial practice or custom that was deliberately indifferent to civil rights in general and that violated the plaintiff's civil rights in particular.

Monell Claims – Policies and Procedures

- "Persistent and widespread practice" that is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Diaz v. Miami-Dade Cnty.*, No. 20-10245, 2021 U.S. App. LEXIS 6320, at *8-*9 (11th Cir. Mar. 4, 2021) (citations omitted).

- This standard "prevents the imposition of liability based upon an isolated incident." Id. at *8 (citation omitted).

Categories of Damages

- Medical expenses: Usually very minimal
- Funeral expenses
- Loss of companionship/society
- Punitive damages
- Attorneys' fees

IMMUNITY

Qualified Immunity

- State and local government officials
- Applicable to individuals *only*
- Ex: police officers; medical directors
- Not applicable to privately-contracted medical providers

Sovereign Immunity

- State and local government officials
- Applicable to governments and individuals acting in their *official capacity*
- Insurance waiver for tort liability up to policy limits
- Not applicable to privately-contracted medical providers

COVID-19

- Several states have enacted laws providing additional immunity for injuries or incidents that occurred during the pandemic for negligence claims that often accompany 1983 claims.

- Example: North Carolina's Emergency or Disaster Treatment Protection Act
  - Complete immunity for healthcare providers in civil cases against claims of ordinary negligence
  - Applies to a health care providers, facilities or entities whose provision of healthcare services was impacted by the pandemic
  - Does not protect bad actors or gross negligence/intentional infliction of harm

COVID-19 Lawsuits

- Class action suit filed by prisoners in Oregon against State Dept of Corrections has been certified
  - Filed by the ACLU

- Suit filed on behalf of inmates in Hawaii against the Department of Public Safety
  - Alleging failure to protect inmates from Covid-19

- Settlement recently approved in class action lawsuit regarding Lompoc Federal Correctional Complex against the BOP
  - Alleging failure to do enough to stop the Covid-19 outbreak

COMMON SITUATIONS THAT CAN LEAD TO LAWSUITS

Common “Serious Medical Needs”

- Severe Overdose
- Drug/Alcohol Withdrawal
- Hepatitis
- Glaucoma
- Gunshot Wound
- Obvious broken bone
- Unconscious/unresponsive
- Difficulty breathing
- Mental illness

Not “Serious Medical Needs”

- Back pain/knee pain
- Headaches (depending on frequency/severity)
- General intoxication

Common Allegations

- Delay in medication administration
- Forced medication administration during a period of religious fasting
- Forced treatment
  - Sedation drugs
- Failure to obtain or approve treatment specifically requested by patient
- Protocol for treatment is not “gold standard”
  - Hepatitis A
- Failure to adequately monitor for / prevent self-harm
- Failure to send to the emergency room

Common Themes in *Monell* Claims

- Inadequate training and/or supervision of medical providers
- Inadequate written policies
- Lack of a particular written policy to cover plaintiff's situation
- Unofficial policy / practice to refuse to send patients to the ER/ED
- Unofficial policy / practice of using excessive force

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BEST PRACTICES

Intake Forms

- Intake Forms are often done by officers rather than medical staff
- Can be difficult/impossible to do in cases of intoxication
- Patients can also be dishonest in their intake due to fear of being charged with additional crimes, inability to remember, etc.
- These forms are crucial to establish what monitoring and/or treatment, if any, the patient requires

Medical Records

- Best line of defense – document EVERYTHING

- Documenting Refusal
  - Make sure any refusal, including refusal to consent to treatment, is clearly and regularly documented
  - **Not just the first refusal-** document each time the patient refuses treatment.

- Items Needing Higher Approval
  - X-rays, MRIs
  - Medical devices

- Mental Health Documentation

Vital Signs

- Always document vital signs, and if they seem abnormal, explain why
  - e.g. elevated HR due to fever or withdrawal

- If unable to obtain typical vitals, document clinical vital signs

  - Respiratory rate
  - Skin turgor
  - Pupils
  - Level of alertness
  - Whether patient is eating/drinking/voiding

Medication Administration Records

- Make sure medication types, amounts, and specific times are all documented with each administration.

- Non-formulary mediations
  - Document all efforts to confirm prescription with outside pharmacies and reasons for any delays
  - Document any medication substitutions and the reason for the subsitution

Policies & Procedures

- Written policy that nurses have discretion to send patients to the ER
- Standing orders for medication protocols and formulary substitutions
- Protocols for common treatment situations
  - Drug withdrawal
  - Alcohol withdrawal
  - Communicable diseases
  - Mental health / suicide

Policies & Procedures

- Keep statistics
- Better data means it is easier to disprove unofficial policy, pattern, or practice
- What does the population look like?
- How commonly do you see this condition?
- How often do you send patients to the ER per month?
  - How many with this specific medical need?

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QUESTIONS

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