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ATTORNEYS

2023 Legal Update for Correctional Health Care Professionals

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Avenues to Legal Liability

- State law
  - Medical malpractice
  - Negligence
- Federal law
  - Cause of action under 42 USC § 1983
  - For violations of Fourth, Eighth, or Fourteenth Amendment rights

Wisconsin Administrative Code

- WI Admin. Code Chapter DOC applies to correctional facilities
- Chapter DOC 350 is specific to jails
  - DOC 350.13 inmate health screening, including health appraised to be completed within 14 days of inmate's arrival
  - DOC 350.16 control and administration of medication, including review of meds brought in by inmate or their family and documentation of everything
  - DOC 350.17 suicide prevention, including frequent communication between health care and corrections staff regarding status of inmates on suicide watch
- No private cause of action for violations of these regulations. *See* Wis. Stat. § 301.36(5) (enforcement by AG and DAs)

Why are most claims and lawsuits federal civil rights claims?

- Cap on medical malpractice damages of $750,000 (in addition to medical bills)
- Medical malpractice claims require expert testimony-- $$$
- Cap on damages recoverable against municipalities under Wis. Stat. § 893.80(3) of $50,000
- No damages caps under § 1983
- Attorneys' fees are recoverable to the prevailing party in a § 1983 case pursuant to 42 USC § 1988
- 3-year statute of limitations

I've been sued. Now what??

- A complaint is filed in court naming you as a defendant. You may be served with a copy, or you may receive a "waiver packet" in the mail.
- Your employer and/or its insurance company will retain an attorney to represent you. All you have to do is participate/ cooperate.
- In the vast majority of cases, you are not at risk of any personal liability for any judgment, verdict, or settlement.
- Your attorney will file an appearance and answer for you.
- Your attorney will work with you to gather relevant documents, understand your recollection of events, and answer discovery requests.
- You may be deposed, and your attorney may take depositions.
- Your attorney may collect the plaintiff's jail records and past medical records depending on the injury alleged.

How does a lawsuit end?

- Your attorney may file a motion to dismiss or a motion for summary judgment.
  - If it is granted, the claims against you are dismissed.
- The case may proceed to mediation or other settlement negotiations.
  - You usually do not need to participate in this process. If settled, your employer or its insurer agrees to pay money in exchange for a release of all claims and liability against you.
- If not dismissed on a motion or settled, it will proceed to trial.
  - You WILL need to participate in this process.
- If the case concludes through dismissal via motion or through a trial, it may still be subject to an appeal.
  - You do NOT have to do anything for purposes of an appeal. The Court of Appeals relies on the record from the district court.

Civil Rights Claims Refresher/Reminder

- Constitutional claims require **something more than negligence or even medical malpractice**; "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).
- Reasonableness is key: "Evidence that the defendant responded reasonably to the risk, even if he was ultimately unsuccessful in preventing the harm, negates an assertion of deliberate indifference." *Rasho v. Jeffreys*, 22 F.4th 703, 710 (7th Cir. 2022).

The role of the nurse:

- "[I]t is important to take into account the role that the nurse plays in the care of a patient. As a general matter, a nurse can, and indeed must, defer to a treating physician's instructions. However, that deference cannot be 'blind or unthinking.'" *Reck v. Wexford Health Sources, Inc.*, 27 F.4th 473 (7th Cir. 2022)
- Under some circumstances when a nurse is aware of an inmate's pain and the ineffectiveness of the medications, a delay in advising the attending physician or in initiating treatment may support a claim of deliberate indifference.
- Think about your chains of communication, chain of command, and ensuring information is shared and acted on.

How do I know what Amendment applies?

- For all intents and purposes, it should not matter in relation to the day to day care you provide to any inmate, detainee, or arrestee.
- It becomes relevant to lawyers for determining the legal standard that applies to any § 1983 claim filed against you. And if you work in corrections long enough, you may very well be sued.
- Fourth Amendment = arrestees, and pretrial detainees prior to probable cause hearing
- Fourteenth Amendment = pretrial detainees after a probable cause hearing but before conviction (most county jail inmates)
- Eighth Amendment = convicted inmates (usually state prisons, but sometimes applicable to county jail inmates)

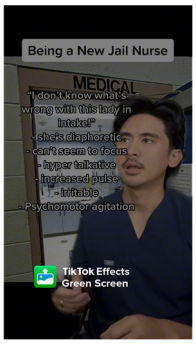
Eighth Amendment

- I thought the Eighth Amendment prohibited cruel and unusual punishment? How does that apply to me?!
- Per SCOTUS, depriving a prisoner of medical care serves no valid penological purpose, so deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain proscribed by the Eighth Amendment."
- Applies to sentenced inmates.
- Objective and subjective components:
  - Objective: Inmate must demonstrate that his medical condition is objectively, sufficiently serious: generally, one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention.
  - Subjective: Inmate must demonstrate that the defendant acted with a sufficiently culpable state of mind: the defendant knew of and disregarded an excessive risk to the inmate's health

Subjectiveness - State of Mind

- The defendant must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists **and** must also draw the inference—no liability for "should have known" unless it is totally obvious.
- An official's failure to alleviate a significant risk that he should have perceived but did not cannot constitute an infliction of cruel or unusual punishment. In other words, there is no liability even if a provider should have known of a risk based on training and experience—as long as it is established that the provider did not actually know (or if it is established that the provider knew of the risk but did not disregard it)

"Awareness" of facts and "drawing inferences" can be a fine line…



Fourteenth Amendment

- Pretrial detainees who have had probable cause hearing
- Objective Reasonableness
- In medical care claims, the jury must decide 1) whether the defendant acted purposefully, knowingly, or recklessly; and 2) whether the defendant's actions were objectively reasonable. *Pittman v. County of Madison, Illinois*, 970 F.3d 823 (7th Cir. 2020)
  - if the defendants "were aware" that their actions would be harmful, then they acted "purposefully" or "knowingly"; if they were not necessarily "aware" but nevertheless "strongly suspected" that their actions would lead to harmful results, then they acted "recklessly."
- The standard cannot be applied "mechanically" but instead must turn on the totality of the facts and circumstances of each particular case, without regard to any subjective belief held by the provider as to whether the response was reasonable.

Fourth Amendment?

- What about arrestees who are brought into a jail but haven't yet been booked in, or those who are booked in but haven't yet had probable cause hearing?
- Objective reasonableness applies
- (1) whether the defendant had notice of the arrestee/detainee's medical needs; (2) the seriousness of the medical need; (3) the scope of the requested treatment; and (4) police interests, including administrative, penological, or investigative concerns.
  - *Ortiz v. City of Chicago*, 656 F.3d 523, 530 (7th Cir. 2011).
- Based on what you knew at the time and not with the benefit of hindsight.

Recent Fourth Amendment Example

- *Braun v. Village of Palatine*, 56 F.4th 542 (7th Cir. 2022)
- While driving home one night, Braun suffered a seizure and crashed into a telephone pole. Braun could not remember what happened, but his appearance, behavior, and circumstances of the accident led responding officers to suspect that Braun was intoxicated.
  - Braun had slurred speech, bloodshot and glassy eyes, and difficulty balancing. He told the officer that he lived in "Chicago-Miami." And he said he had consumed a beer earlier in the evening.
  - He struggled with field sobriety tests.
- Officers arrested him for a DUI.
- Once at the jail, Braun passed a breathalyzer test but officers took him to the hospital to collect blood and urine samples.
- After booking was completed, Braun was released from custody but then suffered another seizure while still at the jail.
- Nothing heard or observed would suggest to a reasonable jail or police officer that Braun needed medical assistance—no notice:
  - Although Braun initially told the officers that he did not feel well, he quickly changed course and said that he was "fine."
  - When asked if he was injured, needed medical care, or suffered from a medical condition, he responded "no."
  - Nothing officers observed undermined these statements.
  - Braun's physical symptoms were limited to those suggesting intoxication.

Recent Eighth Amendment Example

- *Brown v. Osmundson*, 38 4th 545 (7th Cir. 2022)
- Brown began having pain in his abdomen and a few days later told prison's NP. Brown had preexisting hernia. NP thought pain was related to the hernia. She prescribed pain meds, Brown returned to his cell, but pain became more severe.
- By two days later, Brown was no longer eating or drinking. Guards took Brown to infirmary where prison nurses and doctor treated him for 3.5 days, but his pain worsened. His BP was spiking, he continued to vomit, and his abdomen eventually became hard to the touch. But his blood and urine tests were normal, no fever or chills. He was then transferred to a hospital where he was diagnosed with an appendicitis and required surgery.
- Brown sued the NP, the doctor, and the nurses, arguing that they each should have caught the appendicitis sooner.
  - Brown easily met the objective prong of the test: an appendicitis is an objectively serious medical need.
  - The subjective element is usually the more difficult hurdle. Did the providers actually know of a substantial risk and did they disregard it?
- So how does an inmate prove the second element?
  - Showing evidence of a denial of medical care altogether
  - Significant/unreasonable delays in medical care
  - continued ineffective treatment
  - ignoring obvious risks ("head in the sand")
  - refusing care because of cost
  - providing treatment that is a "substantial departure from accepted professional judgment, practice, or standards."

- An ER doc testified that Brown's symptoms were general and not specific to any abdominal issue, and he also explained that an appendicitis can be difficult to diagnose.
  - The ER doc testified that the "classic case" of appendicitis—distended abdomen, fever, nausea, vomiting, and an elevated white blood cell count—occurs infrequently. And notably, Brown did not have all of those tell-tale symptoms.
- There was no evidence that the prison doc knew of and disregarded a substantial risk of appendicitis based on the inmate's presentation.

What about "disregarding" a known risk?

- Courts recognize that delays are common in the prison setting with its attendant limited resources. In this case, the doc sent Brown to the ER 3.5 days after he learned of and began treating Brown's symptoms.
- The court said that while the doctor "could have been more attentive, he did provide care after only a minimal, not inexcusable or excessive, delay." It also noted that Brown may have received "subpar care" in the prison infirmary. But medical malpractice is not a constitutional violation.
- Additionally, the prison medical staff treated Brown by gradually increasing monitoring and testing as Brown's conditions worsened, and when necessary, they sent Brown to the hospital. At no point did the doc "abandon his duties as a physician such that no minimally competent professional would have so responded." So, even if mistaken or even negligent, the providers did not "disregard" any risk of which they were aware.

Another Eighth Amendment Example

- *Munson v. Newbold*, 46 F.4th 678 (7th Cir. 2022)
- While incarcerated in a state prison, Munson developed sensitivity in two teeth because of old, poorly fitted partial dentures.
- Munson initially went to the prison's dental unit for a walk-in appointment in April 2014. Dentist said he was not a candidate for new dentures but recommended extractions of the two teeth. Munson agreed to extraction of one tooth but not the other.
- Munson's regularly scheduled dental exam in July 2014 had to be rescheduled multiple times because of lockdowns. Munson was seen in August.
- At August 2014 appointment, dentist numbed Munson's mouth and began examining it.
- Munson had to leave the appointment early to take a legal call before treatment could begin.
- Munson said he submitted one or more complaints about his pain to the dentist afterwards, but the dentist had no knowledge of them and there was no evidence the dentist ever received them*.
- In February 2015, the dentist treated the second painful tooth by removing decay and filling the cavity.
- In September 2016, Munson had more appointments to address a third painful tooth and to be evaluated for new partial dentures. Dentist told Munson that new dentures would exacerbate his third painful tooth and recommended extracting it.
- Munson said no to the recommended extraction and then had no further appointments with the dentist before being transferred to a different prison. He then sued.
- No liability: delays were not provider's fault:
  - Munson's primary complaint was pain, which can be an objectively serious medical condition. This would meet the first, objective prong of the test.
  - But, the court found that the doctor could not be faulted for not construing Munson's complaints as urgent "when Munson himself twice abandoned treatment when it was offered."
- The doctor was not aware of a substantial risk of harm based on Munson's complaints and actions. Had Munson acted differently—perhaps in a way that would suggest that treatment was more urgently needed—the outcome might have been different.

*So what about those "lost" complaints?

- Inmates allege this **all the time** in lawsuits: "I submitted at least ## written request slips!" But we search and find no record of those slips having been received by anyone, let alone existing.
- Ultimately, the burden of proof lies with the plaintiff. However, some courts will consider this a material disputed fact that requires a trial.
  - In *Munson*, the court did not really dig into this issue and it may not have been relevant to the claims against any given individual.
  - Where it is one side's word against the other, the judge cannot make the call.

Request Slips…

- Inmates can base constitutional claims on ineffective request/notification systems. They must prove that the jail and/or health care provider recklessly failed to improve or discontinue an ineffective notification system. *Reck v. Wexford Health Sources, Inc.*, 27 F.4th 473 (7th Cir. 2022).
- Also, evidence of a widespread practice of failing to review inmates' timely filed medical requests (or not timely reviewing them) can support a deliberate indifference charge against the entity responsible for reviewing the requests. *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010).
- Avoid this issue altogether! Consider the system in place at your facility. If you hear lots of complaints about lost request slips, or if your system is inherently unreliable, consider ways to improve the system.

What Else Can I Do to Prevent or Limit Liability?

- Review your current policies to make sure they actually address and apply to the issues you routinely deal with.
  - Even if you are not an administrator or in a senior position!
- Look at **all** of your procedures with a critical eye. How is information shared? Are there more efficient or effective ways of communicating and/or ensuring that those who need to know, do?
- How do you work with/what is your role within the bigger picture of the correctional setting in which you work?
  - How do you (or perhaps, how should you) work with correctional staff and any mental health care staff?

Claim: delay, delay, delay…

- "A delay in treating non-life-threatening but painful conditions may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain." *Arnett v. Webster*, 658 F.3d 742, 753 (7th Cir. 2011).
- Whether delay rises to the level of deliberate indifference depends on how serious the condition is and the ease of treatment.
  - Fact-intensive, case-by-case inquiry:
  - A three-month delay in referring an inmate to an outside specialist could establish deliberate indifference where the inmate was in substantial pain
  - But a court affirmed dismissal of a claim where inmate waited six days to see a doctor for an infected cyst.
  - Same for the 3.5-day delay in *Brown* for his appendicitis.

Claims based on understaffing

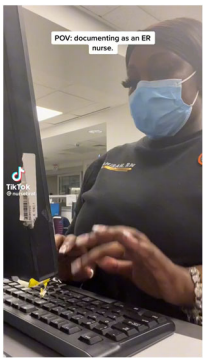
- Deficiencies in staffing and delays in treatment can give rise to a deliberate indifference claim. *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983).
- Deliberate indifference can be demonstrated by proving there are such systemic and **gross deficiencies in staffing, facilities, equipment, or procedures** that the inmate population is effectively denied access to adequate medical care.
- However, if you have no authority to hire more staff, you cannot be liable for deliberate indifference based on understaffing.
  - Usually, the ability to address a shortage lies with the contracted medical provider—UNLESS, the medical positions are fully staffed and are still insufficient to meet the needs of the institution's population. Then it may fall on the jail to add more services/positions to the contract.

Understaffing, continued…

- Prison officials exhibited "deliberate indifference to serious medical needs" in violation of Eighth Amendment where two of three physicians at the prison were recent immigrants from Vietnam whose English language skills were such that they could not communicate effectively with patients; psychiatric care component of the medical care system was not adequately staffed; the position of staff psychiatrist had been unfilled for over two years and there seemed to be no prospect of filling it; and there were many individual instances of medical maltreatment.
  - *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983)

- Even if deficiencies in inmate care are attributable to a chronic, severe shortage of health care staff, it does not always result in a finding of deliberate indifference.
- Where officials make reasonable efforts to address the shortage, they are not deliberately indifferent even if it persists.
  - E.g. increasing the number of providers, authorizing unlimited overtime for providers, paying travel stipends and "supercompetitive salaries," and increasing the use of telemedicine. *See Rasho v. Jeffreys*, 22 F.4th 703 (7th Cir. 2022).
  - These steps "demonstrated a commitment to addressing the problem—the antithesis of the callous disregard required to make out an 8th Amendment claim."
  - "It is always possible to do more or move faster, but the existence of policies that may have been more effective does not mean an official recklessly disregarded the risk of harm." *Rasho* at 711.

Reminder/Refresher: Report Writing



Reminder/Refresher: Report Writing

At approximately 0315 Writer received a call from Intake to come assess one in the arrest area. writer immediately took the electronic blood pressure machine and went to the arrest area. Upon arriving several corrections officers and police officers were supporting a male patient in a sitting position on the floor. The patient was cuffed and in a wrap. Writer was told the patient's name, that patient had been cleared at St. Vincent's hospital following a seizure. The patient had a reported history of seizures and questionable compliance with medication. The Patient was diaphoretic, pale, and semi responsive. Patient groaned and shook his head when asked questions, but never uttered an actual word. Writer was unable to get a blood pressure with the electronic device. Security staff was notified that patient would not be accepted into the facility. Writer recommended that patient be taken to the hospital immediately. Officers then hoisted the patient up with the wrap and began placing patient into the vehicle. Writer noticed that patient had become less responsive, and noted that patient had another small seizure while in the vehicle. Following that patient became completely unresponsive to multiple attempts of verbal and painful stimuli. Writer walked to the other side of the vehicle where the patient's head was checked for a pulse and for breathes. Writer determined that the patient was pulseless and not breathing; writer instructed the officers to get patient out of the vehicle. Once the patient was out of the vehicle writer again checked for breathing and a pulse. Upon confirming no pulse, and no breathes writer called for patient to be released from the cuffs and CPR to begin. Once patient was un-cuffed and unwrapped writer began chest compressions. The Police officers got an AED from their vehicle and one of the corrections officers retrieved a bag mask and began giving breathes. EMS was called. At some point the AED was switched out for another. The patient never had a shockable rhythm while police and staff performed CPR. EMS arrived at approximately 0330 and took over rescue efforts. Writer continued to observe for several minutes, when the corrections officers returned to the building Writer too left the sally port area. Writer sent a message to writer's supervisor right away and awaited further instructions.

SUBJECTIVE: (DO YOU OR HAVE YOU EVER HAD?)		COMMENTS (IF APPLICABLE):
Current thoughts of self-harm?	☐ Yes ☒ No	
History of suicide attempts?	☒ Yes ☐ No	1 week ago
Current thoughts of harming others?	☐ Yes ☒ No	
History of violence towards others?	☒ Yes ☐ No	••••
History of being victimized?	☒ Yes ☐ No	• •••
History of being sexually assaulted?	☒ Yes ☐ No	••••
History of sexually assaulting others?	☐ Yes ☒ No	

Is this person obviously a higher risk for victimization or assault? ☒ Yes ☐ No
How does the patient identify him/herself in terms of gender? ☒ Male ☐ Female ☐ Gender Neutral
If self-identification differs from outward appearance, notify jail administration for housing decision.
Additional comments:

DENTAL SCREENING:	COMMENTS (IF APPLICABLE):
What is the general condition of the teeth?	Good
What is the general condition of the gums?	Good
Is inflammation present?	Went
When was your last dental exam?	Unknow

HABITS: Alcohol use: ☒ Yes ☐ No Daily — Injectable drug use: ☐ Yes ☒ No
Tobacco use: ☒ Yes ☐ No ½ pad — Other drug use: ☒ Yes ☐ No

Have you ever had seizures or other symptoms of withdrawal after stopping the use of alcohol/drugs? ☐ Yes ☐ No ?

DRUG/ALCOHOL OF CHOICE:	FREQUENCY/AMOUNT:	LAST USE:	WITHDRAWAL HISTORY
THC	Daily	2 months	
Cocaine	Daily	2 months	
Alcohol use	Daily	2 month	

PPD Done: ☐ Yes ☐ No Date Completed: (Refer to TB Screening Form for results)

REFERRAL TO: ☐ Mental Health ☐ Dentist ☐ Medical ☐ Wound Care ☐ Other
☐ Chronic Clinic for:

My signature below indicates that I have answered all questions truthfully and I have been informed about how to access medical services.

Patient Signature: Date:

Nurse Signature [redacted] Date: 7-1-1

Reminder/Refresher: Responding to Requests

Inmate's Signature [redacted] Date: 6/29/16 Time: 1500 ☐ AM ☐ PM

INMATE REQUEST OR DESCRIPTION OF PROBLEM. (PLEASE PRINT CLEARLY)

I would like to see psych so I can get on my meds. Also would like to see if my UTI is gone
Thanks

DO NOT WRITE BELOW THIS LINE (FOR HSU STAFF ONLY)

What mental health issues are you experiencing at this time?
must write separate slips for each issue

[redacted] Date: 6, 30, 16

9/01/10

Inmate's Signature [redacted] Date: 6/29/16 Time: 400 ☐ AM ☒ PM

INMATE REQUEST OR DESCRIPTION OF PROBLEM. (PLEASE PRINT CLEARLY)

I was wondering how come none of my psych meds got approved for me to take while Im here I need these meds/Also which meds were dropped off and if I can have any of them. I also need to see the Psych DR ASAP

DO NOT WRITE BELOW THIS LINE (FOR HSU STAFF ONLY)

What mental health issues are you experiencing?

psychiatrist denied Quetiapine & Benztropine There is no indication of you taking these medications prior to jail, as someone filled them after you were already incarcerated.

[redacted] Date: 6, 30, 16

9/01/10

Questions? Feel free to contact me any time!

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