Illinois Trial Lawyers Protecting the Civil Rights of Incarcerated Inmates Under § 1983

by Arthur S. Gold

It is certainly admirable that many members of ITLA represent incarcerated inmates who are deprived of their Constitutionally-guaranteed right to adequate medical care. These lawyers are not commonly known as "Civil Rights Lawyers" but indeed they are! This article seeks to review the requirements of an inadequate medical care case for Illinois inmates under §1983.

Before discussing legal requirements for this category of §1983 cases, we want to make sure the reader appreciates that obtaining the client's medical records from the prison is a first essential step. The inmate is entitled to these documents upon making a request. If prison officials do not turn over these records, a FOIA request can be made. If these two steps fail, a Petition for Discovery pursuant to Illinois Supreme Court Rule 224 should be considered.

Once the records are obtained, the records should be reviewed in *detail.* Key to discovering the nature, extent, and the seriousness of the injury or illness are the nurse's notes. Medical treatment and causal connection should be reviewed with the appropriate medical expert. This type of case necessitates that the inmate has suffered a "serious injury or illness" as the case law below defines that term.

The Constitutional and Statutory Basis for this type of case

The 8th Amendment to the U.S. Constitution states:

> "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted."* (emphasis added)

42 U.S. Code §1983 states:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

These two citations compose the foundational basis for what has developed into a §1983 "Deliberate Indifference" line of cases. The 7th Circuit Court of Appeals and the U.S. Supreme Court have both explained the cause of action: "Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they display *deliberate indifference* to serious medical needs of prisoners" (emphasis added)[1]

The inmate's burden of proof of "Deliberate Indifference" to a serious medical need contains both an objective and subjective component:[although a] prisoner is not required to show that he was literally ignored."[2]

Objective Component

To satisfy the objective component, the prisoner must demonstrate that his medical condition is "objectively, sufficiently serious."[3] A serious medical condition is 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.[4] To satisfy deliberate indifference's objective component, the prisoner must demonstrate that his medical condition is "objectively, sufficiently serious."

Judge Posner[5] sets forth his definition for the objective component as whether sufficient pain existed as an issue for the jury. Specifically Judge Posner stated:

> Deliberately to ignore a request for medical assistance has long been held to be a form of cruel and unusual punishment ... but this is provided that the illness or injury for which assistance is sought is sufficiently serious or painful to make the refusal of assistance uncivilized.... A prison's medical staff that refuses to dispense bromides for the sniffles or minor aches and pains or a tiny scratch or a mild headache or minor fatigue—the sorts of ailments for which many people who are not in prison

do not seek medical attention—does not by its refusal violate the Constitution.

This "objective" component for the attorney is less difficult to establish when facing the usual motion for summary judgment by the defense.

Subjective Component

To satisfy the subjective component, a prisoner must demonstrate that prison officials acted with a "sufficiently culpable state of mind."[6] This concept was broadened when the Supreme Court held that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."[7] Courts subsequently segregated *Monell* concept liability into three separate categories: 1) an official policy adopted and promulgated by a corporation's officers; **or** 2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; **or** 3) a corporate official with final policy making authority did the action. We emphasize the "or" in what has been characterized as a *"Monell"* liability case since the "subjective" component of proof in these cases is substantially more difficult to establish than the objective component. The attorney must try to develop evidence to satisfy this subjective component in one *or* all of these categories. Liability under section 1983 attaches where a deliberate choice to follow a certain course of action, when various alternatives are present, is made by an official with ability or responsibility to establish final policy on the subject matter in question.[8] This is true even if the actions taken by the policy maker was only taken once.[9]

An example of the subjective component[10] is where the prisoner was presented with painful cysts on his groin region and was not diagnosed.[11] The prisoner's physician, who knew the case and who possessed approval power to treat accordingly, prescribed only antibiotics and Tylenol. Despite the antibiotics and Tylenol the prisoner remained in constant pain and openly complained of the pain.[12] The physician in question also refused to approve of the specialist who could definitively diagnose the prisoner's condition.[13] The court held that there was enough evidence available that a reasonable trier of fact could conclude that the physician's treatment of the prisoner constituted a deliberate indifference to a serious medical need:

> Dr. Hamby's assertion that a patient's report of extreme pain without a documented cause does not constitute a 'medical necessity,' and his insistence that a referral to a specialist is not appropriate when 'I don't know what it is [that] is causing the pain,' make no sense. The fact that a general practitioner is unable to identify or document the cause of a patient's pain does not strike us as a reason to *reject* a request to see a specialist; indeed, as Hayes's counsel observed, it suggests just the opposite…. But the very reason why a specialist would be called in is that a generalist is unable to identify the cause of a particular ailment. … Though we could say more, this is enough to show that a reasonable trier of fact could conclude that Dr. Hamby's treatment of Hayes constituted deliberate indifference to a serious medical need. Summary judgment was therefore an inappropriate resolution of Hayes's cause against Dr. Hamby.

As alluded to previously, the prisoner need not demonstrate that he was literally ignored to prevail on an Eighth Amendment claim.[14] And the Court has ruled[15] "[t]he fact that plaintiff did receive some medical care and treatment while in custody at the MCC does not immunize defendant Jenkins' conduct and certainly does not mandate granting summary judgment in defendant Jenkins' favor…The officials must [only] know of and disregard an excessive risk to inmate health; indeed they 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."[16] The 7th Circuit further opined that a Plaintiff need not establish officials intended or desired the harm that transpired.[17] Instead, it is sufficient enough to demonstrate that a defendant knew of a substantial risk of harm to the inmate and disregarded the risk[18] "… [a] fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[19] Moreover, prison healthcare staff may *not* persist with treatment they know to be ineffective when reasonable alternatives are available.[20]

Wexford

The private company of Wexford Health Services Inc., www.Wesfordhealth.com. located in Pittsburg, Pennsylvania, provides doctors and medical staff personnel to all Illinois prisons pursuant to contract with the State of Illinois for approximately $136,000,000 per year. It also contracts with other states to provide the same services. It is this writer's opinion that Wexford has every incentive to keep the costs of providing medical services as low as possible.[21] Indeed, an independent Medical Investigation Team of Ron Shansky, M.D., Karen Saylor, JD, Larry Hewith, RN and Karl Meyer, DDS approved by the United States District Court in 10-cv-4603 concluded that the … "State of Illinois [via Defendant Wexford] has been unable to meet minimal constitutional standards with regards to the adequacy of its health care program for the population it serves." [Case # 10-cv-4603, Doc # 339] The study by this team demonstrated significant delay in providing adequate medical treatment to prisoners. To be sure, a significant delay in effective medical treatment supports a claim of deliberate

Illinois trial lawyers continued on page 34

Illinois trial lawyers continued from page 33

indifference, especially where the result is prolonged with unnecessary pain,[22] and while it may be easier and more cost efficient, the U.S. (?) Supreme Court has held that a doctor's choice of the "easier and less efficacious treatment" for an objectively serious medical condition would still amount to deliberate indifference for purposes of the Eighth Amendment.[23] As in *endnote x:*

> …[Dr. Hamby] identifies the critical question presented here as: 'was Dr. Hamby's medical treatment of this prisoner was [*sic*] so blatantly inappropriate as to evidence intentional mistreatment?' This is almost correct, but it is missing a crucial point. ***This case comes to us on summary judgment. Thus, the complete question is whether, when viewing the record in the light most favorable to Hayes, a reasonable trier of fact could conclude that Dr. Hamby was subjectively aware of Hayes's serious medical condition and either knowingly or recklessly disregarded it.*** (Emphasis added)

Official Policy and Governmental Practice

An example of either of these types of subjective components is found in a recent 7th circuit decision.[24] In that case the plaintiff claimed it took twenty-six days to receive palliative care after jail personnel first became aware of a malignant tumor. It was not claimed that delay caused his eventual death but that the twenty-six days of pain constituted a constitutional violation of deliberate indifference. It was claimed that poor communication amongst the medical providers caused the extended pain when these providers knew or should have known of the plaintiff's serious condition. The plaintiff claimed the jail personnel accused him of faking. The plaintiff argued that the sloppy record keeping of the county as demonstrated in written records and indirect proof resulted in sufficient evidence of an official policy.[25] This plaintiff presented expert testimony from a department of justice investigator after a seventeen month investigation into the Cook County healthcare system. It was sufficient to have a district court summary judgment reversed with a finding that "Six days of intense pain cannot be considered *de minimis* for eighth amendment purposes."

Conclusion

The challenge of these types of cases affords the trial lawyer an opportunity to make a real difference for those unfortunate enough to find themselves incarcerated.

Endnotes

1 *Greeno v. Daley*, 414 F. 3rd 645 (7th Cir. 2005), 429 U.S. 97 (1976).

2 *Id.*

3 *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970.

4 *Foelker v. Outagamie County*, 394 F. 3rd 510, 512-513 (7th Cir., 2005).

5 *Cooper v. Casey,* 97 F. 3rd 914 (7th Cir. 1996)

6 *Id.* 511 U.S. 834, 114 S. Ct. (1970).

7 *Monell v. Department of Social Services*,

436 U.S. 658, 691 (1978).

[8] *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1298.

[9] *Valentino v. Village of South Holland*, 575 F. 3rd 664 (7th Circuit 2009) (holding that municipalities can be held liable even if the action in question is only taken once.).

[10] *Hayes v. Snyder*. 546 F. 3rd 516 (7th Cir, 2008).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* 414 F. 3rd 645 (7th Cir. 2005), 429 U.S. 97 (1976).

[15] *Henderson v. Harris 899 F. 2d 612, 616-617 (7th Cir. 1997*).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Kelley v. McGinni* 899 F. 2d 612, 616-617 (7th Cir. 1997).

[21] It is undisputed that Wexford has a contract with the State of Illinois for approximately $137,000,000 per year and this writer has been unable to locate any semblance of Wexford returning any portion of that sum as a refund to the State of Illinois because its costs were lower than anticipated. Furthermore, on August 25, 2016 the 7th Circuit in *Pettes v. Imxhotep* 14-2674 addressing Wexford's approach to costs said "In July 2012, Petties finally saw an ankle specialist, Dr. Samuel Chmell, who ordered a second MRI after noting weakness in Petties' ankle. Dr. Chmell also ordered physical therapy, gentle stretching exercises, and follow-up treatment. In August 2012, Dr. Carter was replaced as the medical director of Stateville by Dr. Saleh Obasi, another Wexford employee. Dr. Obasi approved the order for a second MRI, but did not authorize physical therapy. According to Petties, he also said that surgery was too expensive"… "While the cost of treatment is a factor in determining what constitutes adequate, minimum-level care, medical personnel cannot simply resort to an easier course of treatment that they know is ineffective. *Johnson,* 433 F. 3rd at 1013*, Roe ,* 631 F. 3rd at 863 (although administrative convenience and cost may be permissible factors for correctional systems to consider, the Constitution is violated when they are considered to the exclusion of reasonable medical judgment about inmate health).

[22] *Grieveson v. Anderson*, 538 F. 3rd 763, 779 (7th Cir. 2008), (reversing summary judgment for defendants where plaintiff did not receive treatment of a painful broken nose for nearly two days.

[23] *Estelle*, 429 U.S. at 104 & n.10, citing *Williams v. Vincent*, 508 F. 2nd 541 (2nd Cir. 1974); *Johnson v. Doughty*, 433 F.3rd at 1013 (stating that "medical personnel cannot simply resort to an easier course of treatment that they know is ineffective."

[24] *Davisv. County of Cook*. N0. 13-3634.

[25] *Thomas v. Cook County Sheriff's Department* , 604 F. 3rd 293, 303 (7th Cir.2009).

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