Who's Responsible?
Medical Treatment for Arrestees and Inmates

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Who's Responsible?

What is the legal requirement to provide medical care?

- What is the legal standard?
- How is liability created?

How is the medical care defined?

Who pays for the medical care?

What type of medical care is required?

What is the risk?

- Lawsuits/ Consent Decrees/Verdicts/Attorney's Fees/Settlements

How can you defend your client?



Legal Requirements - *Estelle*

Estelle v. Gamble, 429 U.S. 97 (1976)

Inmate injured while working on prison work assignment

Between the date of the injury (November 9) and February 9, he was seen by various health care providers 17 times. He then filed a lawsuit.

Legal Requirements - *Estelle*

The obligation to provide medical care is rooted in the Eighth Amendment. "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment.

Legal Requirements – Post *Estelle*

Farmer v. Brennan, 511 U.S. 825 (1994)–

Deliberate Indifference has a subjective and objective component.

- OBJECTIVE PRONG, requires the inmate to demonstrate that "the deprivation alleged was objectively, sufficiently serious."
- SUBJECTIVE PRONG, requires the inmate to show that a prison official acted with a "sufficiently culpable state of mind."
- AN INMATE MUST PROVE THAT THE OFFICIAL KNEW OF AND DISREGARDED AN EXCESSIVE RISK TO INMATE HEALTH OR SAFETY.
  - The official was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed…and then drew that inference.

Modern Deliberate Indifference – Post *Estelle*

Today, care must be at "a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards" and "designed to meet routine and emergency medical, dental, and psychological or psychiatric care."

Specifically, prisoners are entitled to access to care for diagnosis and treatment, a professional medical opinion, and administration of the prescribed treatment.

Modern Deliberate Indifference – Post *Estelle*

Deliberate Indifference is FAR DIFFERENT than the state law negligence standard used in medical malpractice cases.

- The standard of medical care ordinarily expected to be provided in the local community.

NOT SUFFICIENT:

- Jail Medical Personnel failed to pursue some possible avenue or diagnosis.
- Should have known that their symptoms indicated a particular medical condition.
- Another doctor would have disagreed with the particular treatment avenue pursued.
- Inmate would have preferred another treatment avenue.

Current Trends – Medical Advancements

In June, 2016, the CDC endorsed recommendations of the American Association for the Study of Liver Disease ("AASLD") and the Infectious Diseases Society of America ("IDSA") to administer Direct Antiviral Agency ("DAA") drugs to all patients with chronic Hepatitis C virus ("HCV") infection.

DAA can have a 95% cure rate but can cost anywhere from $26,400 to more than $100,000 per patient.

Current Trends – Medical Advancements

Very costly medication – are inmates entitled to this treatment?

- In light of rapidly evolving legal and medical developments in this area and the absence of any controlling Fourth Circuit or Supreme Court authority on the legal issue before the Court, there is no clearly established statutory or constitutional right **at this time** for inmates with chronic Hepatitis C to be treated with DAA drugs. *See* *Cunningham v. Sessions*, 2017 WL 2377838 (D. S.C. May 31, 2017).
- Qualified Immunity granted to the named government officials. However, the case left open the possibility for injunctive and declaratory relief.

DELAY IN TREATMENT

An inmate needs to establish that they delay in treatment had a detrimental effect on him or her in order to bring a claim.

- 8th Circuit held that while the plaintiff prisoner presented evidence of his diagnosis and treatment and delay, he failed to offer any evidence showing that the alleged delay in treatment had a detrimental effect on him, and therefore failed to create a genuine issue of material fact on an "essential element" of his lawsuit. *Laughlin v. Schriro*, 430 F. 3d 927 (8th Cir. 2005).

DELAY IN TREATMENT

- Delay in vaccinating inmate suffering from Hepatitis with Hepatitis A and B vaccines was not a violation of the Eighth Amendment. Worry or distress about acquiring Hepatitis is insufficient for constitutional violation. *Wood v. Idaho Department of Corrections*, 391 F.Supp 2d 852 (D. Idaho 2005).
- Compare with - there is a duty to arrange for medical care, when it is clear and obvious to all that failure to provide will lead to further sickness or injury. (Examples – ruptured appendix, others).

Current Trends -- Privatization of Inmate Care

Multiple private agencies provide medical care in jails:

- Corizon Correctional Healthcare Inc. – provides care to approximately 345,000 inmates in 27 states. Revenue of $1.5 Billion in 2015
- Correct Care Solutions. LLC -- provides care to approximately 250,000 inmates in 38 states. Revenue of $547 Million
- MHM Correctional Services, Inc. provides care to approximately 280,000 inmates in 12 states. Revenue of $134 Million
- Wexford Health – provides care to approximately 112,000 inmates in 7 states. Revenue of $122 Million
- California Forensic Medical Group, Inc. -- provides care in approximately 32 Counties in California. Revenue between $50-100 Million.

Current Trends - Privatization of Inmate Care

All vendors have faced litigation for inadequate care.

Corizon has recently lost contracts in Tennessee, Pennsylvania, Maine, Maryland, Minnesota, New Mexico and New York City.

CFMG has been the focus of Grand Jury investigations in multiple Counties in California.

Nevertheless:

CFMG recently won a 5 year $121 Million contract from Fresno County (7/1/18)

Wexford Health won a 30 month, $360 Million contract from Alabama (4/1/18)

Current Trends - Verdicts

Garza v. County of Los Angeles; Failure to Diagnose/Treat resulting in seizure and brain injury. $5.9M settlement (Approximately $750k spent defending the County of Los Angeles) February, 2018

Ryan v. County of Nassau; Inadequate Medical Care resulting in suicide. $7.8 M verdict. April 2017

Borges v. County of Humboldt; Failure to Treat methamphetamine intoxication resulting in death of inmate. $2.5M verdict. Resulted in settlement, February, 2018.

Current Trends - Verdicts

McGill v. Correctional Healthcare Companies, Inc.;Failure to Diagnose stroke symptoms. $11.4 M verdict. December, 2014

Harrison v. County of Alameda; Failure to Treat; Wrongful Death; $8.3M Settlement, March, 2015

J.M.M. v. County of Los Angeles; Failure to Summon and Provide Medical Care after fight with other inmate. $3.9 M settlement. August, 2017

Current Trends – Class Action Suits

These cases are rampant in California

- Unique circumstances – AB 109
- Multiple counties have been sued across state forcing fundamental change in provision of medical and mental health care and payment of monitoring and attorney's fees.
- Court maintains jurisdiction of case throughout life of settlement agreement/remedial plan/consent decree.
- County of San Bernardino has just entered into a tentative settlement governing most areas of medical and mental health care. Remedial plan, and monitoring, has a four year term.
- Cases are virtually impossible to defend.

Common Causes of Concern

- Mental Health Treatment
  - Suicide Prevention
  - Use of Isolation Cells
- Medical Treatment
  - Timeliness of Care
  - Chronic Care
  - Specialty Care

How to Defend – Warning Signs

Letters from Counsel

"Advocacy Letters"

Letters, frequently from counsel for inmates complaining about conditions in custody. Particularly related to medical conditions, but can be related to any of the rights of the inmates.

Complaint letters regarding conditions in custody, not related to a particular inmate.

Grand Jury Investigations

Many Grand Juries have the ability to investigate non-criminal activity and report on what they find. The most common civil matter they investigate is the operation and condition of local jails.

24 states grant Grand Juries the power to investigate custody facilities. These states include California, Georgia, Iowa, Illinois, Louisiana, Mississippi, North. Carolina, Oklahoma, and Tennessee.

How to Defend - PLRA

Prison Litigation Reform Act

- A hurdle to filing – an inmate must exhaust all internal grievance processes prior to filing a federal lawsuit.
- It is an affirmative defense for jails if the inmate does not comply.
- However, there is no requirement under PLRA for inmate to plead or attach that they exhausted.
- *Woodford v. Ngo*, 548 US 81 (2006) and *Jones v. Bock*, 549 US 199 (2007)
- CONTRAST WITH - Remember to check State counterpart statutes i.e. Maryland Prisoner Litigation Act ("MLPA")– more onerous pleading standard which actually required the inmate to affirmatively plead and attach proof of exhaustion of administrative remedies. *See* Md. Cts & Jud. Proc. 5-1003.

How to Defend – Qualified Immunity

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

- Did defendant's conduct amount to a constitutional violation?
- Was the right clearly established at the time of the violation?
  - Whether a constitutional right was clearly established at the time of the violation turns on whether it would be clear to a reasonable defendant that the conduct was unlawful in the situation confronted.

How to Defend – Deliberate Indifference

To establish deliberate indifference to a detainee's serious medical need, the plaintiff must demonstrate that:

- Defendant had subjective knowledge of a risk of serious harm;
- Disregarded that risk; and
- Acted with more than gross negligence.

All three elements must be proven to establish deliberate indifference.

How NOT to Defend –

Do Not Test

Delay as Denial

Running Out the Clock

Attorney's Fees

Attorney's Fees are the life blood of litigation against public entities.

Prison Litigation Reform Act (PLRA) cases v. Civil Rights cases (ADA, etc.)

PLRA is federal legislation that places certain requirements on plaintiffs before suing over various conditions of confinement. PLRA limits attorney's fees to approximately $200 per hour.

Attorney's Fees

The exposure to attorney’s fees changes the analysis on settling cases and can frequently exceed the award granted to plaintiff.

No such limitations on non-PLRA cases such as ADA cases. In Southern California, attorneys are routinely awarded $600-$900 per hour in civil rights cases.

Therefore, be on the look out for "non- PLRA" cases and understand the risk.

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