Challenges in Correctional Healthcare
The Law and the Lawsuit*

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October, 2011

In planning this article, we played around a bit with what the title should be. We settled on "Challenges in Correctional Healthcare: The Law and the Lawsuit" because our goal is two-fold. First, with minimal reliance on legal jargon, is to familiarize you with the basic legal theories in play in correctional healthcare claims that have led to evolutionary precedents. Second, is to move from the legal basis for such claims and discuss the nuts and bolts of a lawsuit – answering in a practical and useable manner the question: "I've been sued. Now what do I do?"

Theories of Liability Claims Against Correctional Healthcare Workers
The world of correctional healthcare litigation differs in many ways from mainstream medical negligence and malpractice claims. Claims are often brought on the basis of the United States Constitution and filed in Federal Court. Most are brought by a prisoner unrepresented by an attorney. We'll address the typical theories of liability seen in correctional medicine regarding claims against healthcare workers.

First and foremost, federal constitutional theories come into play. Under constitutional theory, the inmate argues that he or she has a constitutional right to a certain level of medical care in prison and sues, arguing they did not receive that care.

Second, there are state law based claims for relief -- tort claims. The typical state tort claim is for negligence – or the professional malpractice claim. Such a state claim is governed by state common law – (developed from court precedents) or state statutory law.

As a practical matter, lawsuits against correctional healthcare workers almost always have a federal-based claim and often a state claim. We rarely see just state-based claims.

Wherever you stand on the interpretation of U.S. Constitution – whether you consider yourself a strict constructionist or support more judicial activism – it is undeniable that the Constitution has and continues to evolve to meet the perceptions of fairness of modern society. The question of whether a prisoner has a constitutional right to certain medical care has followed that evolution.

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Originally, there was no discussion of the cruel-and-unusual-punishment provision being used to address prison conditions. In fact, prior to the Estelle case (which we will discuss shortly), the Eighth Amendment had been applied only to cases in which the mode of punishment (usually execution or torture) was at issue. Also, prior to the 1960's there was very little federal court intervention in states operations of prisons and jails. It wasn't until 1963 and 1964, in Jones v. Cunningham and Cooper v. Pate that the United States Supreme Court started to back off of this "hands off" doctrine.

Estelle v Gamble, 1976
Then came Estelle – in essence, redefining the constitutional concept of "punishment."

Facts: J.W. Gamble was injured when a bale of cotton fell on him while he was part of a prison work assignment. He continued to work but became stiff and was sent to the prison hospital. He was examined, given no treatment, and sent back to his cell. After his pain intensified, he was given pain medication by a nurse, examined by a doctor and diagnosed with lower back strain. He was allowed a bed rest pass for two days. His pain continued over several months when, despite Gamble's protest, he was certified by the doctor to return to light work. When Gamble refused, he was brought before a disciplinary committee. During this time, Gamble experienced chest pain that went untreated for days, despite requests for treatment. When finally seen by a doctor, he was diagnosed with irregular cardiac rhythm.

Estelle brought suit on his own and that case was dismissed. He then obtained counsel and this case made it to the U.S. Supreme Court.

The Supreme Court observed the government has an obligation to provide prisoners medical care and sometimes the failure to provide that care may actually produce the type of "physical pain or death" that met the Eighth Amendment prohibition against cruel-and-unusual punishment. It determined failure to provide medical care rose to this level when the state actor displays a "deliberate indifference to a serious medical need" of the prisoner.

Thus, to constitute an Eighth Amendment violation for inadequate medical care there must be two things:

(1) An objectively serious medical condition; and
(2) Deliberate indifference to that condition.

An objectively serious medical condition is "one that has been diagnosed by a physician as mandating treatment or one so obvious a lay person would be able to know it required medical attention." One key in determining this is whether the failure to treat the condition could result in further significant injury or the unnecessary infliction of pain.

Example: Mauchlin v. Bier, 10th cir (2010). Prison physician's one-day delay in providing inmate with antibiotics for his sinusitis was not a violation of inmate's serious medical needs in violation of the Eighth Amendment, since sinusitis was not a life-threatening condition, except in very rare circumstances. It's most often treated by allowing the infection to resolve on its own.

Example: Ambrose v. Puckett. Ambrose had an appendectomy that went bad. The inmate continually complained about pain and vomiting. He was finally diagnosed with an incisional ventral hernia as a complication of surgery. The court allowed the case to be heard by the jury

as there was evidence to show deliberate indifference – not as to the surgery – even though it might be argued to be sub-par – but because of the failure to diagnose and treat the post-surgical complication.

The doctor in *Ambrose* didn't help his case when he testified the reason he did not perform follow-up testing was because "prisoners fake illness all the time" and he didn't take the inmate's complaints seriously. And, although what the doctor said had some truth (those in the real world of correctional medicine know the advantages a prisoner may gain in claiming an illness) malingering should never be assumed. If you fail to assess and/or treat on that basis, be prepared to have to eat your mistakes in the form of a lawsuit.

As a side note, *Estelle* doesn't affect state tort claims including claims for negligence and professional malpractice. State tort claims, while generally similar from state to state, can have significant differences, including, in many instances, damage limitations beyond the scope of this article.

The Lawsuit

Sometimes defense lawyers wonder 'what the heck was that plaintiff's lawyer thinking?' A recent article, written by the Staff Attorney and Healthcare Project Manager at a prisoners' legal service organization, and appearing in the Harvard Civil Rights – Civil Liberties Law Review, gives some insight regarding what the plaintiff's lawyer may in fact be thinking. He notes healthcare is the number one issue inmates are bringing to his legal service for possible litigation.

Breaking it down further, the lawyer observed several reoccurring prisoner healthcare complaints:

- Reluctance to test;
- Reluctance to diagnose;
- Reluctance to send to outside consultation;
- Claims that the inmate is a malingerer.

These top four claims are consistent with the types of claims we observe as claims tendered under insurance policies and for legal defense. While not an exclusive list, it is one that, if committed to a mental checklist in day-to-day practice, can go a long way in providing quality medical care and mitigating the risk of being involved in litigation.

As of today, according to an electronic search of a popular legal database, *Estelle* has been cited in 26,579 cases. That, of course, isn't all of the prisoner medical care cases – just those on appeal or for which the opinion was otherwise picked up on the database. By now you may be asking, is there any hope to not being sued, or if sued to reach a prompt and just resolution?

Well, "yes" is the answer. The Prison Litigation Reform Act (PLRA) has had the effect of greatly reducing prisoner complaints. Congress enacted PLRA, in 1996, as a response to significant increases in prisoner litigation in the federal courts.

Highlights include:

- An exhaustion requirement;
- A physical injury requirement;
- A three strike requirement on frivolous suits and,
- Very significant provisions regarding the ability of courts to enter orders requiring prisons to undertake certain reforms.

From a boots on the ground perspective, the exhaustion requirement is the most important. It requires, before an inmate may file suit, they must first exhaust any administrative grievance system to address the complaint.

Example: Francis v. United States (2011). Tammie Francis was serving life-term in a federal facility in Connecticut. She fell out of her top bunk, sustaining an ankle injury. She was diagnosed with a sprain and, despite requesting an x-ray, did not receive one until weeks later. Finally, she was diagnosed with a non-displaced fracture of the fibula.

Francis didn't file a complaint within the 20 day grievance limit. She argued she was excused from the 20 day requirement, as she was waiting for copies of her medical records. Following dismissal of her grievance, she filed suit against the U.S. and the nurse alleged to have been responsible for the misdiagnosis.

The case was dismissed. The Court said she didn't need to have her medical records for the grievance and, having failed to timely file the grievance, as required by the PLRA, barred her claim. The Court also found even if she had exhausted her administrative system, she hadn't established negligent conduct and provided no facts supporting deliberate indifference to a serious medical need as required by Estelle.

What happens if you get sued?
First, (as others before us have said) take a deep breath. Don't panic. As a healthcare employee, or as a defendant, you need to make sure the case gets to people that will help you. To do this you have to give prompt notice of being sued.

Give Notice. If you have insurance – either through private insurance or a governmental entity – it's important that notice is given or coverage could be compromised and default taken. This may seem elementary, but there are horror stories about this failure of notice.

Example - case handled by one of the authors: A special utilities district was sued and the general manager served with the complaint during a time his wife was very ill. He set the suit aside and did nothing. Later, he got notice of a default and then a default judgment. He never told the employer, even though the judgment was against the district. Not until the Court entered a contempt order against the GM for not responding to efforts to collect the judgment and ordering him to jail for his failure to appear, did he tell his employer. The case originally was very defensible, but ended up settling for significantly more money than it needed to due to the default. Worse, the district's insurance company denied coverage because of the failure to provide timely notice.

So, moral of the story - give notice to all: risk managers, insurance companies, those in your supervisory chain. Follow the standard protocols of your organization.

Preserve the records. If you didn't expect the suit, thus not having already preserved the records - including electronic ones – do it promptly. Most important, don't go back and add to the record. Judges, juries and your defense lawyers hate that - for good reason. It looks like manufacturing evidence. You'll have ample opportunity to tell your story to your attorney.

(A side note about social media: Be careful what you say. It's discoverable. Don't start tweeting about having been sued. If you have an open social media account, put controls on it but remember, even with controls, the other side can get an order to have it produced.)

From here, your attorney will become involved and may file an Answer or may try and dismiss the case before filing an Answer. The Motion to Dismiss is often used in these cases in an attempt to get an early dismissal on the basis that, even if the claims of the prisoner are to be believed, the case should be dismissed as it does not rise to the level of a viable legal claim.

If the case progresses, there will be a discovery phase. These include mandatory disclosures of documents and information, written interrogatories (questions), as well as other types of pre-trial discovery. You may, if the case is one in which the prisoner is represented, have your deposition taken. If the prisoner is representing him/herself, such depositions rarely occur. Preparing for the deposition is beyond the scope of this article, but your attorney should have ample advice for you. Make sure that you feel prepared and if not – tell your attorney.

There may be a Motion for Summary Judgment. This differs from the Motion to Dismiss in that it goes outside the pleadings to address facts of the case and whether it should proceed to trial. An important standard in deciding such a motion is whether there are disputed issues requiring a jury or judge to hear evidence to make a decision on who's facts to believe. If there is, the Motion will likely be denied. There may be, at some stage of the pre-trial proceedings, a Settlement Conference.

You'll be glad to know that the vast majority of these cases don't go to trial. Most are dismissed by Motion to Dismiss or on Summary Judgment. Those cases that survive will generally settle. If you go to trial, you'll need to be present for the entire trial. You will almost surely testify. And, even in trial, still don't panic, statistically you are likely to win as the success rate for prisoners in such suits at trial is not high.

Top Five Questions Asked by Defendants

When you are sued, keep open communication with your attorney. You shouldn't feel in the dark - your attorney has a professional obligation to keep you informed. If you don't feel sufficiently informed - call the attorney. Over the years we have fielded thousands of questions from clients. Here is our top five list:

- Who is paying your (the attorney) fees? In most cases, the insurance company of the government entity pays the defense costs.

- Should I hire my own lawyer? In some cases that may make sense, and if so, the facility's attorney will cooperate with your attorney. But the facility's attorney is also your attorney and owes you the same duty, in most cases, as if you hired them.

- How long will a lawsuit take? It depends. It could be two years or more if it goes to a trial, or much less if it dismisses early.

- Will the insurance company try and settle this case? Generally, if they aren't successful in dismissing the case, they will probably try for a settlement.
trial, or much less if it dismisses early.

- Who can I talk to about this case? Your attorney (typically protected by attorney client privilege). You may have official investigations by your employer (these are typically discoverable), but these probably have already happened before the case has gone to suit.

What can you do to prevent a lawsuit?
Essentially, your best defense is a strong offense. You should initially perform a risk assessment of your facility and its practices. From there, you can identify weak areas and prioritize the risks that present the highest potential for frequency and severity. Once you have identified these risks, work to eliminate or mitigate the controllable hazards through a risk management plan. Schedule staff training. Create written procedures and establish a review process. Your insurance broker or insurance carrier should be able to point you toward risk management resources.

Finally, take the time before a claim arrives to understand your insurance coverage. Know what your limits are and what rights you hold within your policy. Do you have a voice in whether your claim is settled or goes to court? Does your policy even cover deliberate indifference charges? Making the effort today could save you a lot of headaches down the road.

**This article is largely a product of a recent webinar produced by the authors on this subject.*

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