Evaluating the Jail Medical Neglect Case

By Conal Doyle

INTRODUCTION

What civil trial attorney wants to invest hundreds of hours and up to a hundred thousand dollars to represent a client who has a certain criminal record, will likely be in jail at the time of trial and wants to sue a sympathetic defendant that is entitled to a myriad of complex and powerful liability defenses? The answer to this rhetorical question is obvious: not many. Consequently, the area of jail medical neglect provides an opportunity for competent and creative attorneys to create a niche in an interesting, challenging, and rewarding area of the law.

Jail medical neglect, sometimes referred to as "conditions of confinement," is both legally and factually complex. These cases typically involve both state law medical negligence claims as well as federal constitutional claims brought under 42 U.S.C. § 1983. Moreover, there are usually multiple defendants, including individual medical care providers and non-medical personnel such as prison guards, public entities, and sometimes private entities that have been contracted with to provide on-site medical care for jails. Some examples of these cases include, but are not limited to, significant delay in treating a known serious medical condition, complete failure to treat a condition, and failure to refer to a specialist for a known serious medical condition due to financial or other reasons. This article presents an overview of the law as well as the practical issues that arise in these complex and challenging cases.

CASE SELECTION: HOW TO SCREEN AN INADEQUATE MEDICAL CARE CASE

1. The Client

Perhaps the most difficult mental obstacle encountered in screening a jail case is the plaintiff. As trial lawyers, we have come to learn that our client's credibility, presentation, and jury appeal are some of the most important elements of any case. However, here every prospective plaintiff has some type of criminal record, is possibly incarcerated, and does not meet any lawyer's idea of the ideal client. One inescapable aspect of each of these cases is that the jury will know that the plaintiff was arrested and jailed and will not necessarily be sympathetic to the plaintiff's plight.

Nevertheless, client presentation is still vital and you should resist the temptation to accept a case without meeting your client face-to-face. Even the most open-minded juror may have difficulty looking past a plaintiff that is covered from head to toe with tattoos and body piercings. Thus, it is still important to have a client with some degree of jury appeal.

Regardless of your client's presentation, you should be able to prove your case through the medical records, other documentation maintained by the jail, or independent witnesses. The case is a questionable one if you need the jury to believe your client's story over the testimony of the defense witnesses, who will be in uniform.

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2. The Documents

The first step in evaluating a new case is to gather all of the documentary evidence possible through public records requests to the public entity that was responsible for providing medical care to your client. (See sidebar.) In California, public records are defined by Government Code § 6252 as:

> "Public records" includes any writing containing information relating to the conduct of the public's business *prepared, owned, used, or retained* by any state or local agency regardless of physical form or characteristics. (Emphasis added.)

Consequently, you should seek to obtain all records related to your client and all other documents necessary to prove your case against the governmental entity or private entity that provided the medical care. If the public entity (and target defendant) stonewalls on the production of documents, Government Code § 6259 authorizes a verified petition to the Superior Court in the county where the records are

located to compel production of the documents. The statute also provides that the petitioner is entitled to reasonable attorneys fees and costs after prevailing in an action filed under this code section.

3. Who to Sue

a. The entities

Most jail medical neglect cases will arise out of a county jail, state correctional facility or federal penitentiary. However, many jails and correctional facilities have privatized or delegated the provision of medical care to private corporations, such as Prison Health Services (PHS) (www.prisonhealth.com), Correctional Medical Services (CMS) (www.cmsstl.com), or Corrections Corporations of America (CCA) (www.correctionscorp.com) and others. These companies actually provide medical services on-site at the correctional facility and are sometimes indistinguishable from the government employees.[1]

Where the provision of medical care has been privatized, the private entity should be named as a defendant along with the public entity.[2] While these private entities typically mount a vigorous defense, they are more likely to consider economics and risk, such as cost of defense and verdict potential, when evaluating cases. In contrast, many public entities will defend these cases at all costs based on principle. Moreover, a large corporation certainly has less jury appeal than a California public entity, particularly in light of the current budget crisis.

b. The individuals

In addition to naming the entities responsible for the medical care, it is also essential to sue the individuals guilty of neglect in their individual capacity. Both medical care providers and non-medical care providers can be held liable under § 1983 for neglect. For example, a prison guard who ignores complaints and requests for medical care can be a potential defendant. Although individuals are entitled to the defense of qualified immunity in an action brought under 42 U.S.C. § 1983, they should be defendants because the entity cannot be held responsible for their actions under the doctrine of respondeat superior in a § 1983 case. Moreover, punitive damages are available against an individual, but not a public entity.

Generally, public entities will cover a judgment rendered against an individual defendant.[3] If one law firm is retained to defend both the individuals and the entity, it is likely that any judgment against the individual will be covered. The exception to this general rule is usually evident as the individual will be accused of an egregious offense (e.g., rape) that cannot be considered to be part of the employee's official duties

For those of you discouraged about representing a client with a criminal record and mediocre jury appeal, consider for a moment the likely quality of the defense witnesses. Working in a prison as a medical provider or prison guard is not necessarily a desirable or lucrative career and typically does not draw the cream of the crop from Stanford's Medical School. So, you may find that the defense witnesses do not have any more jury appeal than your client.

FORUM SELECTION

You may choose to file suit in federal or state court. However, if you file a § 1983 claim in state court, the defendants will have the right to remove it and will almost always do so. As a result, filing suit in federal court is recommended. Although state court is sometimes considered more "plaintiff friendly" than federal court for various reasons, most plaintiff's lawyers like litigating in state court simply because they are more experienced with and comfortable in that forum. Defense attorneys know this and for that reason alone will want to remove the case, which delays it somewhat, and provides them the first psychological victory in the case.

CLAIM SELECTION

You can and should bring claims under both federal and state law. Your federal claims will be brought under 42 U.S.C. § 1983, alleging violations of the Eighth and/or Fourteenth Amendments. The benefit of bringing federal claims is that your claims will not be subject to MICRA. Therefore there will be no cap on damages and/or attorneys fees. Under 42 U.S.C. § 1988, a prevailing plaintiff is entitled to reasonable attorneys' fees and costs including the possibility of a Lodestar multiplier, which is typically granted in these difficult cases. In California, there is a two-year statute of limitations on these claims.

The plaintiff should also bring claims for medical negligence under state law because establishing liability under § 1983 is uncertain, at best. Be aware that state law claims against a public entity are subject to the six-month pre-suit claim-filing requirement pursuant to Government Code § 910. Moreover, a state law claim for medical negligence is governed by MICRA and the accompanying caps on damages and attorneys fees. There is a one-year statute of limitations for a medical negligence action. (Code Civ. Proc. § 340.5).[4] The benefit of bringing supplemental state law claims along with a § 1983 action is that the jury (or judge) may find no constitutional violation but still determine that the defendants are liable under the lesser standard of medical negligence.

The downside to the § 1983 claims is that they are very difficult to prove. Mere

medical negligence is not enough. The individual defendants are entitled to raise the defense of qualified immunity and the entities cannot be held vicariously liable. The plaintiff has to establish a "policy and custom" violation under *Monell v. Department of Social Services* (1978) 436 U.S. 658. These issues will typically be raised by the defendants via summary judgment and/or motion to dismiss prior to trial.

THE LAW

The scope of this article will only allow for a brief overview of the complex law of medical neglect cases under § 1983. The first step in the analysis is to determine whether the plaintiff can prove that there has been an underlying constitutional violation. Next, the plaintiff needs to establish liability against the respective defendants. To establish public entity liability, the plaintiff must satisfy the requirements outlined in *Monell* by proving that the constitutional violation was caused by an unconstitutional governmental policy or custom, a difficult standard. To prevail against an individual, the plaintiff will have to prove that the defendant violated *clearly established* rights.

1. The Standard for Proving a Constitutional Violation

The seminal Supreme Court case on the issue of prison medical neglect is *Estelle v. Gamble* (1976) 429 U.S. 97. In *Estelle*, the Supreme Court held that a convict must prove that the defendants demonstrated "deliberate indifference to serious medical needs" to establish a violation of the Eighth Amendment's prohibition on "cruel and unusual punishment." Exactly what constitutes "deliberate indifference" is somewhat unclear and requires a discussion that is beyond the scope of this article. However, it is clear that mere negligence or inadvertence in diagnosing or treating a medical condition does not violate the Constitution. (*Id*.)

If the plaintiff is a *pre-trial detainee,* the analysis goes from "somewhat unclear" to downright murky. The rights of a pre-trial detainee are governed by the Due Process Clause of the Fourteenth Amendment rather than the cruel and unusual punishment standard of the Eighth Amendment. (*Bell v. Wolfish* (1979) 441 U.S. 520; *City of Revere v. Massachusetts General Hospital* (1983) 463 U.S. 239; *Jonas v. Blanas* (9th Cir. 2004) 393 F.3d 918.) Although it is well settled that a pre-trial detainee has greater rights than a convicted criminal, the legal standard for proving liability has not been clearly established by the Supreme Court. However, there is authority to argue that the standard is closer to medical negligence than deliberate indifference. The Ninth Circuit has held that the *deliberate indifference* standard of the Eighth Amendment does not apply to pre-trial detainees. (*Oregon Advocacy Center v. Mink* (9th Cir. 2003) 322 F.3d 1101, 1120-1121.)

Until the Supreme Court sets forth a clearly defined standard, do not accept the inevitable defense argument that pre-trial detainees are required to prove "deliberate indifference." One of the more plaintiff-friendly decisions has come out of the Fifth Circuit and is not inconsistent with the Ninth Circuit's decisions discussed above. In *Nerren v. Livingston Police Department* (5th Cir. 1996) 86 F.3d 469, the court held that pre-trial detainees "are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." (*Id*. at 474.) This standard sounds more like a medical negligence standard than the intentional tort-like standard of deliberate indifference. Accordingly, you should argue that the standard of "reasonable medical care" applies under *Nerren*, *Mink*, *Blanas*, and *Revere*.

2. *Monell*: Governmental Liability Under § 1983

It is well settled that a public entity is not liable for the actions of its employees under § 1983 by operation of the doctrine of respondeat superior or vicarious liability. Rather, the plaintiff is required to prove that the public entity promulgated an unconstitutional custom, policy, practice or procedure which was the *moving force* behind the constitutional deprivation. (*Monell v. Department of Social Services* (1978) 436 U.S. 658.) In other words, the plaintiff is required to prove that the custom or policy *caused* the constitutional violation.

A proper discussion of the permutations of *Monell* requires its own article. In short, some of the custom and practice theories that have been recognized by the Supreme Court include: (1) establishing a widespread or pervasive practice or custom; (2) failure to correct constitutionally offensive actions such that they are *tacitly* authorized or *ratified*; (3) acts of individual *policy-making* officials (e.g., sheriff, police chief, warden); and (4) failure to train/supervise. (*Id*.; *City of Canton v. Harris* (1989) 489 U.S. 378; *St. Louis v. Praprotnik* (1988) 485 U.S. 112; *Board of the County Commissioners of Bryan County, Oklahoma v. Brown* (1997) 520 U.S. 397.)

3. Qualified Immunity: Individual Liability under § 1983

Qualified immunity is a defense that is available only to defendants sued in their individual capacity. It is an immunity from suit and a defendant is typically entitled to an interlocutory appeal from a denial of qualified immunity. (*Mitchell v. Forsyth* (1985) 472 U.S. 511.) The Supreme Court has recently set forth a more plaintiff-friendly qualified immunity standard in *Hope v. Pelzer* (2002) 122 S.Ct. 2508.

The *Hope* case provides an excellent illustration of how the plaintiff can establish a constitutional violation but lose a summary judgment motion on qualified immunity. In *Hope,* the Eleventh Circuit found that Alabama prison guards violated the Eighth Amendment by chaining a prisoner to a "hitching post" but affirmed the District Court's grant of summary judgment because the plaintiff could not cite "materially similar" case law that demonstrated that the defendants' conduct was unlawful. (*Id.* at 735-36.) The Supreme Court reversed, holding that:

> [Q]ualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz,* 533 U.S. at 206. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell v. Forsyth,* 472 U.S. 511, 535, 86 L.Ed.2d 411, 105 S.Ct. 2806, n. 12,

but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (*Hope*, at 789, citing *Anderson v. Creighton* (1987) 483 U.S. 635, 640.)

The Supreme Court specifically rejected the "rigid gloss" imposed by the Eleventh Circuit that required previous cases to be "fundamentally or materially similar" to defeat the qualified immunity defense. (*Id*. at 741.) Importantly, the court held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." (*Id*.) Finally, the *Hope* court held that under its holding in *United States v. Lanier* (1997) 520 U.S. 259, the salient inquiry is whether the defendants were on *fair notice* that their conduct was unlawful. (*Id*.)

CONCLUSION

Litigating jail medical neglect cases requires patience, resources, and an in-depth knowledge of medicine in a complex area of constitutional law. However, prosecuting meritorious cases serves an important social purpose that can only be advanced by competent and experienced trial attorneys. Nevertheless, choose your clients carefully. ■

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[1] In *West v. Atkins* (1988) 487 U.S. 42, Justice Blackmon held that a physician who was under contract with the state to provide medical services to inmates at a state prison hospital on a part-time basis acted under color of state law, within the meaning of § 1983, when he treated an inmate. Therefore, private entities and/or actors that provide medical care for the state are subject to § 1983 liability.

[2] Contracting out prison medical care does not relieve a state of its constitutional duty to provide adequate medical treatment to those in its custody, and does not deprive state's prisoners of means of vindication of their Eighth Amendment rights under § 983. (See *West*, 487 U.S. at 55-56.)

[3] See Gov. Code § 825, which requires indemnification for acts occurring in the scope of employment and actually authorizes the payment of a punitive damage award against an individual in certain circumstances. (See also, Gov. Code §§ 827, 844.6, and 815.3.)

[4] Also, be aware of Government Code §§ 845.6, 855.4, 855.6, and 855.8, which purport to limit public entities and employees liability for provision of medical care under state law.

DISCOVERY

Asking for the right documents and information is the first step in litigating a jail misconduct case. With effective use of the public records laws, you should have most of these documents prior to filing suit. If you are lucky, you will obtain documents pre-suit from the entity that are not produced in discovery by the defense attorney. The following is a partial list of the types of records and information to request and what to look for:

1. Obtain all of the plaintiff's medical records. Pay particular attention to the "medical intake sheet" or comparable document. Essentially, when an inmate enters the jail, the medical staff is required to evaluate the inmate and note any relevant medical conditions. This form can demonstrate that the jail was "on notice" of a particular medical ailment that was not treated properly.
2. Request information on all of the medical providers, including physician assistants and nurses, that treated plaintiff, including dates, specific times of treatment, and treatment provided.
3. Have defendant identify all prison guards/correctional officers who were on duty in plaintiff's cell block during the relevant time period.
4. Request all jail records (separate and apart from the medical records) that show how often the guards performed checks on the plaintiff (sometimes referred to as an "activity log"). Sometimes, a prisoner with a known medical condition will be required to have 15 minute interval checks. These records are often poorly maintained and may help prove that your client was ignored.
5. You will also need all records of plaintiff's complaints or requests for care during incarceration.
6. In a case where a private entity is involved, there are some essential documents to obtain. The contract or "memorandum of understanding" between the two entities, the Request for Proposal issued by the public entity seeking bids for the privatization, the private entity's policies and procedures for providing medical care, training records for employees, all financial records that demonstrate how the entity is compensated for services. Look for how the contract establishes financial incentives or disincentives. Who pays for transporting a prisoner off premises to a hospital for specialty care? Many of these cases involve a failure to refer an inmate to a specialist. Some of these contracts provide that the private entity is required to pay for the cost of specialty care that it cannot provide on-site. This type of evidence can go a long way in establishing the "deliberate indifference" required to prove a § 1983 violation.
7. Prior claims of inadequate medical care, including prior complaints, settlements, and judgments against the entities and the individuals; and training records. (This may require you to file a motion under Evidence Code § 1043 to obtain a correctional officer's personnel records.)
8. Ask for information about whether there was any investigation or discipline imposed as a result of the alleged misconduct. This may draw objection, but argue that it is relevant to demonstrate ratification of unlawful conduct.
9. Ask for all policies and procedures for providing medical care from both the public and private entities (if applicable). There will oftentimes be two sets of policies and they are not always consistent.
10. Evidence of national accreditation through an organization like the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) (www.calea.org) or the like. Ask for all documents received from CALEA or a similar organization, including "law enforcement standards" and any letters of noncompliance issued in association with a re-accreditation review.