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Denial of medical care to those in custody

POST-ARREST AND PRE-TRIAL CLAIMS AGAINST INDIVIDUAL GOVERNMENT OFFICIALS UNDER 42 U.S.C. § 1983

The death of George Floyd left an indelible mark in our collective memory as we watched images of brutal force inflicted on him by the police. When Mr. Floyd cried out that he could not breathe during the eight minutes that an officer kneeled on his neck, the deadly consequences played out on our screens. While such visceral imagery is usually not captured in incidents involving denial of medical care, those taken into custody all too often suffer significant harm or death due to rampant denial of medical care by law enforcement, either in the field or in the jails. A person taken into custody is entirely dependent on government officials for all their basic necessities, including medical care. Out of the view of the public, they are often treated inhumanely and denied basic rights. Such treatment is obviously inconsistent with principles of humanity and decency, and without advocacy for this vulnerable population, the trust in our institutions will continue to erode.

Because the violations to those in custody are too pervasive to undertake in one article, the focus here is on federal claims against government officials who deny or delay medical care to post-arrest and pre-trial detainees. The recognition of the duty to provide medical care to the incarcerated has its genesis in the Eighth Amendment. As early as 1976, the Supreme Court in *Estelle v. Gamble* (1976) 429 U.S. 97, 104-105, held the government is required to provide medical care for those whom it punishes by incarceration, and that prison officials who act with "deliberate indifference" to an inmate's serious medical needs violate the Eighth Amendment. However, "deliberate indifference" under the Eighth Amendment requires the plaintiff to prove that the official knew of the risk and disregarded the risk of serious harm to the inmate – a difficult "subjective" standard. *Estelle* served as the springboard from which case law evolved to create less stringent standards under the Fourth and Fourteenth Amendments for denial of medical care claims for those not yet convicted.

Color of state law requirement

Individual liability derives from 42 U.S.C. section 1983, which provides a cause of action for a violation of an underlying constitutional right. Section 1983 requires the plaintiff to show that the government official was acting under "color of state law" when he/she caused the deprivation of that right. Color of law applies to a person who is acting in an authorized law enforcement capacity. A public employee acts under color of state law "while acting in an official capacity or while exercising responsibilities pursuant to state law." (*West v. Atkins* (1988) 487 U.S. 42, 50.) This requirement is one of the easiest to meet and the defense will typically stipulate to color of law unless the official was "off duty," or clearly acting outside of their official duties.

Claims for denial of medical care or delaying access to medical care brought against officials under section 1983 violate either the Fourth, Fourteenth, or Eighth Amendment depending on the custody phase when the denial occurred. A post-arrest denial-of-care claim is governed by the Fourth Amendment "objective reasonableness" standard. The claims of those considered to be "pre-trial detainees" are analyzed under the

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Fourteenth Amendment *objective* "deliberate indifference" standard. For convicted prisoners, the "deliberate indifference" *subjective* standard under the Eighth Amendment remains in place.

Post-arrest Fourth Amendment standard

Post-arrest claims usually occur during a police encounter where injuries to an arrestee are either caused by the officer's actions, or where the encounter involves someone under the influence of drugs, or someone experiencing a mental health breakdown requiring prompt medical or mental health assistance. In these common fact patterns, instead of taking the arrestee to the hospital or calling for an ambulance, the arrestee winds up in jail and the delay in obtaining prompt medical care results in further injury or death. The Fourth Amendment requires law enforcement officers to provide objectively reasonable post-arrest care. (*Tatum v. City and County of San Francisco* (9th Cir. 2006) 441 F.3d 1090, 1099.)

The Ninth Circuit has not specified the exact contours of objectively reasonable post-arrest care to a suspect but has held that "[a]n officer fulfills this [Fourth Amendment] obligation by promptly summoning the necessary medical help or taking the injured detainee to a hospital." (*Bordegaray v. County of Santa Barbara* (C.D. Cal. Dec. 12, 2016) 2016 WL 7223254, at *8.) While on its face the duty to promptly summon care post-arrest seems straightforward, the Ninth Circuit provided wiggle room for officers by also holding that officers are not required to provide "what in hindsight reveals to be the most effective medical care for an arrested suspect." (*Tatum* at 1098-99 [holding that "a police officer who promptly summons the necessary medical assistance has acted reasonably for purposes of the Fourth Amendment" even where the arrestee's labored breathing after being handcuffed made it clear he was in distress, but the officer failed to perform CPR].) Administering CPR seems easy enough for officers to undertake when dealing with a subject who is having difficulty breathing and doing so could potentially save a life. However, *Tatum* and other cases are clear that there is no duty for officers to perform CPR, nor are officers required to provide the most effective medical care.

Post-arrest denial-of-care claims require meticulous dissection of the timing of the symptoms displayed by the detainee/arrestee that would have put a reasonable officer on notice of the need to promptly summon medical care. For example, would a reasonable officer have known to summon medical care to Mr. Floyd as he cried out that he could not breathe? One would hope that the answer would be a resounding "yes." But as clear-cut as this may seem, the determination of whether an officer behaved reasonably and sufficiently promptly in summoning medical care for a detainee depends partly "on the length of the delay and the seriousness of the need for medical care," (*Holcomb v. Ramar* (E.D. Cal. Nov. 4, 2013) 2013 WL 5947621, at *4), and this is subject to interpretation. Fortunately, under a Fourth Amendment analysis, the Ninth Circuit has held that the reasonableness inquiry under the Fourth Amendment is ordinarily a question of fact for the jury," (*Henriquez v. City of Bell* (C.D. Cal. Apr. 16, 2015) 2015 WL 13357606, at *7), which makes surviving summary judgment more likely.

Fourteenth Amendment standard for "pre-trial detainees"

Once an arrestee is admitted into a custody facility and prior to conviction, the person is considered a "pre-trial detainee" and denial-of-medical-care claims for this category of individuals falls under the Fourteenth Amendment. A pre-trial detainee has a constitutional right to adequate medical and mental health care which derives from the substantive due process clause of the Fourteenth Amendment. To state a claim for denial of medical care, the detainee must show (1) a serious medical need, and (2) a deliberately indifferent response to that need. (*Jett v. Penner* (9th Cir. 2006) 439 F.3d. 1091, 1096.)

Was the medical need serious?

The medical condition complained of must be serious because not every injury or complaint necessarily translates into constitutional liability. The easiest way to assess whether the condition complained of meets the "serious medical need" prong is whether the condition is "so obvious that even a layperson would easily recognize the necessity for a doctor's attention." If the answer is in the affirmative, this prong will be met. (*Palacios v. City of Oakland* (N.D. Cal 1997) 970 F.Supp. 731, 741.) For those medical conditions that are less obvious, the Ninth Circuit has defined a "serious medical need" in the following ways: "the failure to treat a prisoner's medical condition [that] could result in further significant injury" or the "unnecessary and wanton infliction of pain"; [t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain. (*McGuckin v. Smith* (9th Cir.1992) 974 F.2d 1050, 1059-60, *overruled on other grounds;* see also, *Estate of Prasad v. County of Sutter* (E.D. Cal. 2013) 958 F. Supp. 2d 1101, 1123 *citing*, *Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546.)

Did the official act with "deliberate indifference"?

The term "deliberate indifference" can be a slippery concept and the plaintiff must be vigilant to establish sufficient facts to show that the jail personnel crossed the line from negligent to deliberate indifference, and not merely that the medical care was substandard. The Ninth Circuit in *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060, provided much needed clarity for establishing "deliberate indifference," and in the same opinion held that the standard under the Fourteenth Amendment for a "pre-trial detainee" is an "objective" standard.

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This is a huge victory for civil rights litigants. Before *Castro*, the "deliberate indifference" prong of the test was the same for pre-trial detainees and those already convicted and required a "subjective awareness" of the harm. Prior to *Castro*, all conditions-of-confinement claims, including claims for inadequate medical care, were analyzed under a "subjective" deliberate indifference standard. Essentially, this required the plaintiff to prove "subjective awareness" of the risk on the part of the official getting sued – a difficult standard to meet when all the official had to do was deny awareness of the risk. Although circumstantial evidence could be used to establish awareness by the official, it was an uphill battle for the plaintiff to prove subjective awareness. *Castro* expressly overruled *Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1243-43, which followed a single "deliberate indifference" test for plaintiffs who brought a constitutional claim – whether under the Eighth Amendment or Fourteenth Amendment.

After *Castro*, the test for deliberate indifference concerning a pre-trial detainee is purely objective. The plaintiff must prove more than negligence but less than subjective intent – something akin to reckless disregard. *Castro* set forth specific elements that must be met to establish "deliberate indifference": (1) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) those conditions put the plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved – making the consequences of the defendant's conduct obvious; and (4) by not taking such measures, the defendant caused the plaintiff's injuries. (*Castro, supra,* at 1071-1072.)

As to the first element, only a purely accidental act or inaction would fail to satisfy this requirement. The remaining three elements are purely objective. However, it is important to keep in mind that with respect to the third element in particular, the defendant's conduct must be objectively unreasonable, a test that will necessarily turn on the facts and circumstances of each case.

Complete denial of medical care is not required

To avoid liability, the defense likes to point to cursory encounters an inmate may have had with a nurse or doctor, or other similar bare-bones type of contact between an inmate and jail medical staff. However, to establish deliberate indifference, a detainee "need not prove that he was completely denied medical care." (*Lopez v. Smith* (9th Cir. 2000) 203 F.3d 1122, 1132 (*en banc*) [finding medical and custodial prison staff deliberately indifferent to prisoner's serious medical needs even though prisoner was "provided [with] medical care, medications, and specialist referrals ... during the period in question"]; see also, *Cooper v. Kaur,* 2012 WL 345941, at *11 [the mere fact that defendants provided plaintiff with some form of medical treatment does not necessarily absolve them of all liability for their actions].) Instead, the detainee must show: (1) a serious medical need, and (2) a deliberately indifferent response, such as defendants' "den[ial], delay or intentional interference with medical treatment." *Jett v. Penner* (9th Cir. 2006) 439 F.3d 1091, 1096.)

Identifying who is responsible

In post-arrest cases, the identity of the involved officers can be readily ascertained through arrest or incident reports. In the case of pre-trial detainees, denial-of-care claims may involve various deputies, nurses and/or doctors who could bear responsibility for the harm resulting from the denial. Ascertaining the identity of who within the jail staff is responsible requires extensive document requests. It is important to understand the chronology of the inmate's condition from the time of entry to the jail to the time of the culmination of the injury or death, and who in the chain of jail personnel the plaintiff complained to about his/her condition. The quest for this information will start with production requests seeking a host of the inmate's records, including but not limited to:

- intake records (a process required of every person admitted into a jail)
- medical pre-screening records
- records from the jail's classification unit to reveal where the inmate was housed, or should have been housed
- medical or mental health evaluations
- medical or mental health requests made by the inmate
- housing logs which contain the names of the jail personnel assigned to supervise the housing unit
- inmate movement records which will show the various places where the inmate was located in a given period of time
- surveillance video of the inmate's housing unit
- cell safety-check logs

Importance of "cell safety checks"

Many in-custody deaths happen with the person dying or found unresponsive in their cell due to the failure of the deputies to conduct cell safety checks and ignoring requests for medical care. Leaving inmates unattended also facilitates suicides. Hourly cell safety checks are mandated by Title 15 U.S.C. section 1027.5, and jail facilities will likely have their own policies about cell safety checks. The statute requires hourly safety checks by jail personnel to ensure the safety and well-being of an inmate in their cell. For those inmates on suicide watch, the jails are required to have more frequent safety checks. Deputies often fail to conduct safety checks. Not surprisingly, deputies have been known to falsify the logs required to be maintained documenting their safety checks. Although there is no case holding there is a constitutional right to safety checks, the developing cases after *Castro* are promising.

In *Fray v. County of Marin* (2015) 81 F.Supp. 3d 811, 828, the court decided, "a reasonable jury could find that [a] deputy's failure to take any action to respond to the increased risk to [decedent

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inmate's] health caused the delay or denial of medical care to [decedent inmate]." The court further denied qualified immunity to the officer where he had information that the inmate was found with drugs, had taken drugs "to dispose of incriminating evidence," and "will crash hard," but failed to monitor the inmate by "conduct[ing] regular checks" of his cell, or causing someone else to check his cell, stating, "a reasonable official would have understood that what he was doing violates [inmate's] right not to have his medical needs treated with deliberate indifference." (*Ibid.*) *Medina v. County of Los Angeles*, 2020 WL 3964793 (Slip Copy 2020) is instructive on the issue of whether *pretending* to conduct safety checks while in fact knowingly failing to do so, is a violation of the Fourteenth Amendment deliberate indifference standard. There, the Court reasoned that if under *Castro*, delegating safety checks to a volunteer was one way in which a Fourteenth Amendment deliberate indifference test is met, then effectively pretending to conduct safety checks must also be a violation of that standard. (*Id*. at *19.) The court concluded that *Castro* clearly established the right in question at a sufficient level of specificity and denied summary judgment to the deputies who pretended to conduct safety checks but in fact failed to do them. (*Ibid.*)

Who are state actors?

Deliberate indifference to a pretrial detainee's serious medical needs violates the Fourteenth Amendment whether the indifference is manifested by doctors, guards, or other personnel. (*Estate of Prasad ex rel. Prasad v. County of Sutter* (E.D. Cal. 2013) 958 F.Supp.2d 1101, 1112; see also, *Hunt v. Dental Dept.* (9th Cir. 1989) 865 F.2d 198, 201 [reversing summary judgment in favor of prison dentist where plaintiff presented sufficient evidence of delay of treatment of serious dental problems and defendants' knowledge of them to raise a triable issue].) In addition, many jail facilities contract with private companies to provide medical and mental health care to those in custody.

Since section 1983 only applies to "state actors," a doctor, nurse, or mental health therapist hired by a private company may attempt to assert they are not "state actors." This issue was put to rest by the Supreme Court in the case of *West v. Atkins* (1988) 487 U.S. 42, 55, holding that a "person" for purposes of section 1983 liability may include an individual employed by a private company which provides services to the state by contract. (See also, *Haygood v. Younger* (9th Cir.1985) 769 F.2d 1350, 1354 (*en banc*) [holding it is clear that section 1983 liability extends to a private party where the party engaged in state action under color of law and thereby deprived a plaintiff of some right, privilege, or immunity protected by the Constitution or the laws of the United States].)

Qualified immunity – a growing impediment to § 1983 claims

The Black Lives Matter movement and recent protests have brought to the forefront the gravity of abuse by law enforcement against people of color. Not surprisingly, a majority of the incarcerated population consists of Black and Brown individuals. The lack of accountability toward law enforcement responsible for the abuse must include an examination of the legitimacy of qualified immunity in its current state. Qualified immunity was not a term normally in the lexicon of non-civil rights attorneys, but as a result of the movement for police reform, the call to Congress to rectify the overreach of qualified immunity has become a necessary part of the reform conversation.

Qualified immunity is a legal doctrine that shields public employees from civil liability under 42 U.S.C. § 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.) To determine whether a public employee is entitled to qualified immunity, a court must evaluate two independent questions: (1) whether the employee's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident. (*Pearson v. Callahan* (2009) 555 U.S. 223, 232.)

Qualified immunity is a completely judge-made legal doctrine that originates from the *Harlow* decision where the Supreme Court addressed the question of absolute immunity to President Nixon's aides in a lawsuit for unlawful discharge. The theory was that government officials required some sort of immunity from suits for damages to shield them from undue interference with their duties and threats of liability. However, due to a series of recent conservative Supreme Court decisions, qualified immunity has morphed to shield law-enforcement officials from liability unless the plaintiff can point to a prior legal precedent with nearly *identical* facts from either the Supreme Court or appellate courts to meet the "clearly established" prong of the test. This prong is particularly difficult to meet in denial-of-medical-care cases because there are a myriad of medical issues ignored by jail personnel medical staff. But simply because the same medical condition was not the subject of prior precedent should not prevent an otherwise meritorious case from reaching a jury.

Despite the growing inclination by some judges to dismiss cases on summary judgment based on qualified immunity, there still exist cases that espouse a broader view of qualified immunity. To counter the proposition that a "clearly established" right can only be met by prior precedent with nearly identical facts, useful language remains in even unfavorable Supreme Court decisions that "a right is clearly established when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." (*Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060, 1067.) The practitioner should also note that if there is no binding precedent, a court may

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consider whatever decisional law is available, including decisions of state courts, other circuit courts, district courts, and even unpublished district court decisions. (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712.)

On summary judgment, the facts must be evaluated in the light most favorable to the plaintiff whether the defendant officials violated constitutional rights. Likewise, when determining whether the constitutional violation was reasonably clear to the official, the facts must be viewed in the plaintiff's favor. (*Id.* at 712-713.) The decisional case law need not involve the exact same set of facts. Officials "can still be on notice that their conduct violates established law even in novel factual circumstances." (*Clement v. Gomez* (9th Cir. 2002) 298 F.3d 898, 906; see also, *Hope v. Pelzer* (2002) 536 U.S. 730, 741 [rejecting a requirement that previous cases be "fundamentally similar" to find that the law is clearly established; asking if the state of the law at the time of the complained of events gave defendants fair warning that their actions were unconstitutional; stating that general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful']; *Anderson v. Creighton* (1987) 483 U.S. 635, 640 ["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 …"].)

Alternative state-law claims

To avoid a potential grant of summary judgment based on qualified immunity under federal law, every complaint should allege, when feasible, state law claims for negligence and failure to summon medical care under Government Code section 845.6. Section 845.6 creates liability both in the governmental entity and its agents under the circumstances specified in the unambiguous language of the statute. To state a claim under section 845.6 against a public employee, three elements must be established: (1) the public employee knew or had reason to know of the need (2) for immediate medical care, and (3) failed to reasonably summon such care. (*Castaneda v. Dept. of Corrs. & Rehab*. (2013) 212 Cal.App.4th 1051, 1070.) "Liability under section 845.6 is limited to serious and obvious medical conditions requiring immediate care" where there is "actual or constructive knowledge that the prisoner is in need of immediate medical care." (*Watson v. State* (1993) 21 Cal.App.4th 836, 843.) The determination that an employee knew or had "reason to know" of a serious and obvious medical condition is an "objective standard." (*Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 288.) There is long standing authority holding that section 845.6 creates a duty on the public entity and its agents whose breach of the duty will lead to liability if the elements of the statute are met. (See *Hart v. County of Orange* (1967) 254 Cal.App.2d 302, 306.)

In *Hart*, judgment was affirmed against the County of Orange for failure to summon medical care for a decedent who appeared drunk, although he did not smell of alcohol, and was suspected of having had a stroke. A medical doctor examined Hart and told an officer it would be all right for Hart to stay in the jail, but to send for him if he had another episode. Hart was found unconscious in the morning hours and later died. (*Id.* at 308.) Importantly, this section does not impose a duty to monitor the *quality* of care provided, or once summoned, to provide proper treatment or diagnosis. (*Watson* at 843; *Castaneda* at 1074.)

Be careful of medical-negligence arguments

Whether the denial-of-medical-care claim is framed under federal or state law, it is critical for the plaintiff to *not* make the case about the adequacy of treatment or other medical-malpractice type allegations. Similarly, arguments about the difference of opinions between physicians and medical professionals concerning what medical care was appropriate will likely cause the claim to fail under federal or state law.

The call for advocacy to protect the rights of *all* who suffer abuse at the hands of government officials is as urgent today as when brave individuals marched for civil rights decades ago. In the words of the great Dr. King, "injustice anywhere is a threat to justice everywhere." (*Martin Luther King, Jr.,* letter from a Birmingham Jail, April 16, 1963.)

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