Ben Gideon

Taylor Asen

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TORTS: Representing Incarcerated Victims of Medical Malpractice

By Ben Gideon, Esq. and Taylor Asen, Esq.

There are approximately 4,000 people in Maine jails and prisons. The incarcerated population have a disproportionate amount of health issues, and the care they receive is often poor.

Cases related to medical malpractice in Maine prisons and jails are complicated, in large part because the claims may be governed by different, overlapping, statutes: state statutes, including the Maine Tort Claims Act, the Maine Health Securities Act, and, in cases involving wrongful death, Maine's Death Act; and federal civil rights law, which for the purposes of this article, are set forth in 42 U.S.C. § 1983.

Generally, victims of bad medical care in jail or prison have two different tracks: (1) state-law negligence claims; and (2) federal (or analogous state) civil rights claims.

State-Law Negligence Claims

State-law negligence claims are circumscribed by the provisions of the Maine Tort Claims Act. The State of Maine and Counties that run prisons and jails are immune from suit under the Maine Tort Claims Act. Claims against governmental employees, such as corrections officers, are capped at $10,000. 14 M.R.S. § 8104-D. Moreover, these employees are entitled to a defense of discretionary function immunity. § 8111(C) ("[E]mployees of governmental entities shall be absolutely immune from personal civil liability for ... Performing or failing to perform any discretionary function or duty. ...").

However, the medical care provided in most prisons and jails in Maine is not provided by the governmental entity or their own corrections officer employees. Rather, prisons and jails subcontract the provision of medical care to private, third-party corporations who supply health care services. Unlike the State or municipal entities, or their employees, these private, third-party contractors do not enjoy immunity from state-law medical malpractice claims.

Does the Maine Tort Claim Act's notice requirement still apply to private health care providers? Maybe. Rather than find out the hard way, we err on the side of caution and serve notices of a claim within 365 days, as is required by the Maine Tort Claims Act.

A victim may then pursue medical malpractice claims against these private corporations by following the procedures outlined in the Maine Health Security Act. The standard of proof for these claims is ordinary negligence. There is no cap on recovery, other than the insurance coverage available to the private company or the limits imposed by the Death Act in a wrongful death case.

Civil Rights Claims

Because medical care in a prison or jail is provided "under color of law," victims of bad medical care in a prison or jail may enjoy a cause of action that would not be available to a victim in a private medical office or hospital. That is, if a victim can prove that the failure amounts to "deliberate indifference," the victim may also be able to pursue a civil rights claim under 42 U.S.C. § 1983 or the analogous rights afforded by Maine's Civil Rights Act.

Where a victim can meet the standard of proving a civil rights claim, such a claim may have advantages over State-law negligence claims. First, unlike negligence claims, governmental entities are not immune from civil rights claims (although the State of Maine would be immune under the Eleventh Amendment from claims brought in Federal Court, so such claims would need to be pursued as State civil rights claims in State court). Second, there are no damages caps in civil rights claims.

Of course, the downside of civil rights claims is that they are more difficult to prove, as the conduct at issue must be more than a mere "violation of the standard of care." To prevail in a civil rights claim, a victim must be able to prove that his or her care amounted to "deliberate indifference," in violation of the Eighth or Fourteenth Amendments of the U.S. Constitution. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

Generally, in order to prove "deliberate indifference" under the Eighth Amendment, a plaintiff must prove both "(1) an objective prong that requires proof of a serious medical need, and (2) a subjective prong that mandates a showing of ... deliberate indifference to that need." *Kosilek v. Spencer,* 774 F.3d 63, 82 (1st Cir. 2014); *Zingg v. Groblewski*, 907 F.3d 630, 635 (1st Cir. 2018) ("The subjective component requires the plaintiff to show that prison officials, in treating the plaintiff's medical needs, possessed a sufficiently culpable state of mind.").

However, for **pretrial detainees --** persons who are incarcerated before conviction **--** the law may be different. Pretrial detainees' claims are brought under the Fourteenth Amendment, rather than the Eighth Amendment. In *Kingsley v. Hendrickson*, the Supreme Court determined that, in the context of an excessive force claim for a pretrial detainee, "the appropriate standard ... is **solely an objective one**." 576 U.S. 389 (2015).

Subsequently, a circuit split emerged as to whether *Kingsley*'s relaxed standard for Fourteenth Amendment claims applies to claims for pretrial detainees concerning unconstitutional medical care. *Compare Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (holding that, under *Kingsley*, "a jury must decide whether the doctors' deliberate failure to act was objectively reasonable" with respect to a pretrial detainee"); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018) ("logic dictates extending the objective deliberative indifference standard ... to medical care claims") with *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (holding, in a case concerning medical care provided to a pretrial detainee, that "*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case"); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020) ("We decline to extend *Kingsley* to Fourteenth Amendment deliberate indifference claims.").

Most circuits have taken a position on this issue, but the First Circuit has not. Judges in the District of Maine have hinted, however, that they side with the 7th Circuit as well as the other courts who have applied *Kingsley* to deliberate indifference claims for pretrial detainees. *See Elliot v. Norwood*, 2019 U.S. Dist. LEXIS 21468, at *6 n.3 (D. Me. Feb. 11, 2019) (Nivison, J.) (in the context of a deliberate indifference case, citing *Kingsley* for the proposition that there are "reduced protections for convicted prisoners as compared to pretrial detainees"); *Salcedo v. King*, 2018 U.S. Dist. LEXIS 61205, at *6 (D. Me. Apr. 11, 2018) (Nivison, J.); *see also Rodriguez v. Wolf*, 2020 U.S. Dist. LEXIS 198588 (D. Me. Oct. 2020) (Walker, J.) (citing approvingly Judge Nivison's opinion in *Salcedo*).

Under *Monell* v. *Dep't of Soc. Servs.,* 436 U.S. 658 (1978), a civil rights claim may be brought against a municipality where there is a "policy" or "custom" that gave rise to the constitutional harm. Moreover, *Monell* liability extends to private medical corporations that are contracted to provide medical services for inmates. *See Shields v. Illinois Dep't of Corrections*, 746 F.3d 782 (7th Cir. 2014). Thus, where plaintiff alleges that a municipality violated § 1983 by engaging in an unconstitutional policy or custom, plaintiff should be entitled to discovery regarding other occasions where the private medical provider has been alleged to have engaged in poor care, as well as training materials and policies promulgated by the private medical provider.

Prelitigation Screening

When it comes to civil rights / medical malpractice claims brought in Maine, the issue arises as to the role of the prelitigation screening panel. Medical malpractice claims against private providers for medical care in Maine jails are covered by the Maine Health Security Act. *Demmons v. Tritch*, 484 F. Supp. 2d 177, 179 (D. Me. 2007). By contrast, civil rights claims are not. Courts have broad discretion as to how to handle a § 1983 claim while a prelitigation screening panel is ongoing, but at least some courts have stayed civil rights claims under the resolution of the prelitigation screening process. *See Henderson v. Laser Spine Inst.*, 815 F. Supp. 2d 351, 383 (D. Me. 2011).

Before leaving to open their own firm, Gideon Asen LLC, in November 2020, both Taylor Asen and Benjamin Gideon worked at the Lewiston based law firm, Berman & Simmons PA. They also both earned their JDs at Yale Law School and served as law clerks to judges on the Federal Court.

Contractors, Subcontractors, and Allocation of Liability

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authority relieving Hewes of its basic common law obligation to act prudently when it sees the subcontractor it has hired flouting safety precautions."

Representing plaintiff was Peter Clifford of Clifford & Clifford, LLC, in Portland. "This is a common issue in workplace accident litigation cases," wrote Clifford in an email to *Maine Lawyers Review*. "In such cases, the injuries tend to be very serious, and it is difficult to allocate liability, with multiple contractors attempting to allocate fault.

The decision includes a very helpful examination of the *Restatement* provisions relating to the interactions of contractors and employees on a jobsite," continued Clifford. "There have been few cases on this topic in recent years.

In Maine, under the applicable standard of care, the general contractor frequently has 'non delegable duties' to supervise safety on the jobsite. The general contractor must ensure that the workplace will be safe when it hires the subcontractors, and must also monitor safety while the job is proceeding," explained Clifford.

"In Maine, frequently contractors attempt to evade their responsibility under the Workers Compensation laws to protect workers under their control, by treating them as independent contractors," Clifford wrote. "This decision seems to make clear that any such attempts will be carefully scrutinized."

The opinion in *Novak v. B.W. Hewes & Sons, LLC, et al.* MLR/SC#181-24, is summarized in this issue at page 6.

-Erin Van Den Berghe, ev@mainelawyersreview.com