



THE EVOLVING TEST FOR DELIBERATE INDIFFERENCE IN CORRECTIONAL HEALTHCARE

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In 1976, the United States Supreme Court established in the landmark case of *Estelle v. Gamble* the right to adequate health care for all incarcerated people. In creating this uniquely American right, the Court observed, “It is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.” For nearly 50 years, correctional health care providers have worked to comply with this law, often stretching the limits of human and financial resources as legislation shifts and public health initiatives emerge and fade.

Providing medical care consistent with the standard of care in the free world, to

patient populations that do not mirror the free world, is challenging on the best day. The incidence of substance abuse disorder, for example, is approximately 12 times higher in the incarcerated population, and the incidence of Hepatitis C is about 10 times higher. Often, the newly incarcerated patient has not had access to routine preventive care for chronic conditions, thereby increasing the prevalence of issues like diabetes and hypertension in the correctional setting. Jail and prison administrators must keep apprised of advances in law and medicine applicable to their inmate patients, whose health concerns can vary widely by state, region, and geographic area.

Unsurprisingly, the definition of constitutionally adequate correctional health care also varies by jurisdiction, shaped by judges and juries who render verdicts according to the law, as well as personal experiences, beliefs, and feelings. Often the rulings and verdicts come from cases involving claims of deliberate indifference pursuant to 42 U.S.C. § 1983, such that case law becomes the guidepost for what, exactly, constitutes deliberate indifference.

By way of a small sample of recent deliberate indifference cases, in 2021, a Florida jury awarded \$450,000 after finding jail providers delayed the inmate plaintiff’s colostomy reversal and hernia repair sur-

geries by 11 months. See *Christmas v. Corizon, et al.* (M.D. Fla., April 22, 2021). In another deliberate indifference case a year later, a Michigan jury awarded \$6.4 million to the estate of an inmate patient who died from complications of alcohol withdrawal. See *Jones v. County of Kent, et al.* (W.D. Mich., Dec. 2, 2022). Conversely, a Virginia jury found no deliberate indifference for a jail physician's allegedly improper interpretation of an EKG but awarded \$4 million for negligence. See *Boley v. Armor, et al.* (E.D. Va., Dec. 9, 2022).

Courts mold the definition of deliberate indifference as well, most notably through the grant and denial of motions for summary judgment. For example, a court in Nebraska granted summary judgment in favor of four correctional officers by finding no evidence of objectively serious injuries, and no evidence the officers observed any injuries. See *Yanga v. Eastman, et al.* (D. Neb., Nov. 2, 2022). However, a court in Illinois denied summary judgment in a deliberate indifference case in which prison staff allegedly failed to safeguard an inmate even after the inmate handed staff a suicide note and threatened suicide. See *Lisle v. Welborn*, 933 F.3d 705 (2019).

In other words, that which a California jury deems to be deliberate indifference may not be that which a Florida judge deems to be deliberate indifference, and vice versa. Nevertheless, traditionally, a claim for relief under § 1983 requires proving:

- (1) The defendant had subjective awareness of the plaintiff's objectively serious medical need;
- (2) The defendant was aware there was a substantial risk of harm if that need was not addressed; and
- (3) Notwithstanding awareness, the defendant acted (or failed to act) anyway.

Of the approximately 2 million people incarcerated in the United States, over 450,000 are pre-trial detainees, entitled to the presumption of innocence until proven guilty. If the treatment at issue was provided to a convicted inmate, the 8th Amendment's prohibition of cruel and unusual punishment supplies the right. If the treatment at issue was provided to a pre-trial detainee, the 14th Amendment's due process clause supplies the right. The United States Supreme Court initially detailed this distinction in 2015. See *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

In deliberate indifference cases, courts of appeal are split on whether the standard for proving a violation of the 8th

Amendment differs from the standard for proving a violation of the 14th Amendment. While more Circuits continue to apply the traditional/subjective test than the objective test, the divide is becoming more equal, and in December 2023, the Fourth Circuit became the fifth of the 12 Circuits to adopt the purely objective test. The other Circuits that recognize the objective test are the Second, Sixth, Seventh, and Ninth.

Under the objective test, the pretrial detainee plaintiff suing under the 14th Amendment need not show that the defendant actually knew of and ignored a serious need – just that the defendant should have known of the need, and that the action was objectively unreasonable. Notably, for convicted prisoner plaintiffs suing under the 8th Amendment, the traditional test still applies.

Through its precedent-setting decision in *Short v. Hartman* 87 F.4th 593 (4th Cir. 2023), the Fourth Circuit clarified that a showing that the defendant knew of and disregarded a substantial risk to the inmate's health and safety is sufficient, but unnecessary, to satisfy the test for deliberate indifference. In *Short*, the Court found the defendant prison officials had actual knowledge of the patient's suicide risk, but that all the plaintiff needed to show was that the officials should have known of the patient's suicide risk. There, the decedent attempted suicide while incarcerated and died from her injuries two weeks later. The decedent's husband filed suit against the Sheriff's Office and several individual employees, alleging deliberate indifference towards his wife's risk of suicide.

Applying the elements of the purely objective rubric, the Fourth Circuit in *Short* held, as many courts have, that a substantial risk of suicide constitutes a serious medical need. As reported on the intake forms, Ms. Short had recently attempted suicide and was experiencing withdrawal and feelings of uselessness. As for the second and third elements of the test, the court found the defendants had actual knowledge because they processed the decedent's intake forms, and knew the excessive risk posed by inaction because prison policy clearly included prior suicide attempts and alcohol withdrawal as suicide risk behaviors. The court found the defendants took no steps to mitigate the risk, such as removing the bed sheets from the cell or re-locating the inmate from isolation to a populated cell.

Since *Short*, a handful of published opinions in the Fourth Circuit have applied the "new" objective test. Five days after publication of the *Short* opinion, in another deliberate indifference case involving inmate

suicide, the Eastern District of Virginia applied the purely objective test and denied a defendant psychiatrist's motion for summary judgment. In *Lapp v. United States, et al.* (E.D. Va. Dec. 13, 2023), the prison psychiatrist discontinued antipsychotic medications when the patient returned from the mental health hospital. The psychiatrist testified in his deposition that he did so because the patient stated he no longer wanted to take the medications, but the psychiatrist documented he discontinued the medication "due to lack of current, clinical indication." One month after discontinuation, the patient committed suicide. The Court, applying the objective test, found an issue of fact as to whether the psychiatrist knowingly or *recklessly* disregarded the need for psychiatric medication. Following denial of summary judgment, the psychiatrist settled the case for \$1.75 million.

To mitigate against the more plaintiff-friendly objective test, defendants in the Fourth Circuit are asserting and pursuing the defense of qualified immunity. For example, in a case involving opioid withdrawal, the Eastern District of North Carolina recently granted a motion for summary judgment in favor of several correctional defendants. See *Wright v. Granville County*, the Court (E.D.N.C. Mar. 29, 2024). The Court there found qualified immunity shielded the defendants from liability because at the time of the events, deliberate indifference required a subjective showing – that the defendants actually knew of and disregarded the risk – as opposed to the objective test requiring only that they should have known of the risk.

Other circuits may soon join the five that currently apply a purely objective test for deliberate indifference. Now more than ever, correctional staff must remain knowledgeable about identifying and treating the serious medical needs faced by incarcerated patients. Any correctional health care professional knows that for their patients, care inside the facility often far exceeds the care those patients receive outside the facility. Still, correctional health care must meet certain standards. After all, it is a constitutional right.



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