Hepatitis, Prisons, and the Law

National Network for Prisoners with Hepatitis
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First prison hospital established at Newgate Prison, New York City

One Fortnight later...

...Ye Olde New Amsterdam ACLU Affiliate receives 300 letters complaining of inadequate medical care.

Hepatitis, Prisons, and the Law

- The Basics: Litigating Health Care Issues in Prisons and Jails
- Examples: Individual Cases
- Examples: Class Actions
- The Upshot: The Good, The Bad
The Basics...

Vehicles for Litigation

State and federal tort claims acts

- Prisoners sue the government for money to compensate for harm caused by a government employee's alleged wrongdoing.
- Most of the time, the alleged wrongdoing is medical malpractice. The laws of malpractice and negligence apply.
- Many procedural obstacles to overcome.
- May be only option for suing certain defendants (e.g., PHS officers, employees of private prison companies working in federal facilities).

Vehicles for Litigation

Eighth Amendment Deliberate Indifference

- Prisoners sue based on rights provided by the U.S. Constitution
- Can seek injunctive and/or monetary relief
- Claims are subject to the Prison Litigation Reform Act
- Several types of defendants are immune from suit
- Fee-shifting available

Deliberate Indifference

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment. In 1976, the Supreme Court held that deliberate indifference to serious medical needs can constitute cruel and unusual punishment.

"We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," prescribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guard's in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983."

"...a prison official may be held liable under the Eighth Amendment for denying medical care to a prisoner only if he knows that inmates face some substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

Deliberate Indifference

What does this mean??

Cause of Action
- State and federal tort claims acts
- Section 1983 civil action/Bivens action
  - Eighth Amendment (deliberate indifference to serious medical needs)
  - Title II of the Americans with Disabilities Act (ADA)

Types of Actions
- Individual actions
- Class actions
Deliberate Indifference

What does this mean??

...a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if the official disregards a substantial risk of serious harm, and disregards that risk by failing to take reasonable measures to abate it.

Objective Prong

Subjective Prong

Deliberate Indifference

Some things to keep in mind

- Medical malpractice (i.e., negligence) fails short of the deliberate indifference standard. Hall v. Thompson, 105 F.3d 650, 657 (6th Cir. 1998)
- Non-medical factors may or may not be appropriate to consider in making treatment decisions.
- The community standard of care should apply, sort of.

American with Disabilities Act

[and the Rehabilitation Act]

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132

The ADA applies to prisoners!

Pretty much everything that happens at a prison or jail is a service, program, or activity for the purpose of the ADA.

American with Disabilities Act

[and the Rehabilitation Act]

REPRODUCTIVE SERVICES AGREEMENT
BETWEEN
MISSISSIPPI DEPARTMENT OF CORRECTIONS
(BY AND THROUGH THE ATTORNEY GENERAL)
AND
EAST MISSISSIPPI CORRECTIONAL FACILITY AUTHORITY

The Authority shall be responsible for the costs of treatment of inmates suffering from Acquired Immune Deficiency Syndrome (AIDS) or Human Immunodeficiency Virus (HIV), or Hepatitis C Virus (HCV), as defined by the Center for Disease Control

Iseley v. Dragovich

No. 03-2254 (3d Cir)

Pennsylvania

Time-to-Release as a Contraindication for Treatment
Iseley v. Dragoovich

- Pennsylvania prisoner with symptomatic HCV
- Denied participation in HCV protocol because he was within 12 months of release
- Court: "...implementing the minimum sentence rule as a prerequisite to participation in the Hepatitis C protocol served a legitimate penological goal."
- Postscript: Iseley was ultimately treated because his bad conduct made his release on parole unlikely.

Josey v. Beard

- PA prisoner alleged that "sentence tail" policy was unconstitutional
- For tx, prisoners must have >12-18 months remaining
- Expert reports filed
  - State's experts: Anne Spaulding, Todd Wilcox
  - Plaintiff's expert: Scott Allen
- The Court declined to rule on the constitutionality of the sentence tail policy:
  "Here, it has long been established that inmates have an Eighth Amendment right to medical care. However, the precise contours of deliberate indifference as applied of the sentence tail exclusion of the Hepatitis protocol are not."

Roe v. Elyea

- Estate of Plaintiff Roe and two other prisoners challenged Illinois HCV protocol
- IDOC policy would not provide testing, bx, or tx unless a prisoner had >18 months remaining
- Δ MD testified that the blanket sentenced-based policy was necessary to give health care vendors six months to complete work up, and then one year to complete the 48 week course of tx.
Deliberate Indifference to Risk of Exposure

Harrison v. Cook County

- Harrison arrived at Cook County Jail in 2004
- HCV(-) as of 2005 or 2006
- HCV+ in 2008
- Medical care claims thrown out on summary judgment
- Claim relating to exposure allowed to proceed

Placement in cell with detainee with frequent open, bleeding sores...

Order to walk barefoot through blood...

“Harrison’s evidence regarding his exposure to other inmates’ blood, however, would permit a reasonable jury to find that [Sheriff] Dart maintained a practice of deliberate indifference in this regard...

...'In situations where rules or regulations are required to remedy a potentially dangerous practice,' a municipality’s ‘failure to make a policy is also actionable.’

Harrison v. Cook County, No. 08-C-2302, 2011 WL 4036115, at *9 (N.D. Ill. Sept. 12, 2011)
Some Class Actions…

Hilton v. Wright
No. 9:05-CV-1038 (N.D.N.Y.)

Robert Hilton
- Diagnosed with HCV in 1999
- Prior to incarceration, approved for tx at Bellevue
- Denied tx by Δ Wright due to hx of substance abuse and not having participated in prison-run SA treatment program

Louis Vasquez
- In custody since 1992
- HCV+ in 2004
- Facility MDs recommended tx
- Had hx of participating in prison-run SA treatment program
- Δ Wright denied tx because he was currently enrolled in a SA treatment program at the time of consideration for tx

August 17, 2005: Hilton files complaint seeking class-wide injunctive relief and damages for himself on deliberate indifference grounds.

September 5, 2005: Hilton adds ADA claim for damages.
  - ADA claim based on the disability of history of dependence, which excluded him from participating in the program of medical care.

August 23, 2005: Δ Wright agrees to treat Hilton.

October 2005: Δ Wright claims to have rescinded SA tx requirement.

February 27, 2006: Case allowed to proceed as a class action.


Paragraph 11 of the Hepatitis C Protocol will be revised to read as follows:

No evidence of active substance abuse (alcohol, heroin, cocaine, methamphetamine) during the past 6 months. Inmates with active substance use will be required to submit drug test samples routinely at least monthly (at random intervals) until they have been free of identified substance use for 6 months. The demonstrable 6-month period of abstinence is deemed to commence on the day following the last incident of substance use.

If you have an inmate/patient who might otherwise qualify for Hepatitis C treatment except for a drug or alcohol-related incident in the past 6 months, please submit the Approval for Treatment form as you would for anyone without such incident. The details of the incident and the urgency of treatment will be evaluated individually to determine whether or not the incident results in temporary disqualification for treatment.
**Hilton v. Wright**

- **January 2008:** Interim settlement agreement made final.
- **March 9, 2012:** Second Circuit reinstates Hilton’s individual damages claims, including his ADA claim.
- **March 11, 2013:** District Court permits most of Hilton’s individual claims to proceed.
  
  Trial scheduled for **August 12, 2013.**

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**Bennett v. Correctional Medical Services**

**Walter Bennett**
- Incarcerated from April 15, 1992 through June 5, 2002
- Hx IVDA and pre-1992 transfusion
- While incarcerated, blood tests showed ↑LFTs
- Was not told about the results or their possible significance; no HCV testing
- Prior to discharge, routine pre-released testing showed HCV+. Not told of results or their significance.
- On June 5, 2002, day of release, a nurse told Bennett of HCV+ results and that he should see a doctor.
- The next day, Bennett is married and has unprotected sexual intercourse with his wife.

**John Lacey**
- HCV- (negative)

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**Bennett v. Correctional Medical Services**

**Claims**
- Class action for injunctive, declaratory, and injunctive relief.
- Deliberate indifference: failure to screen, evaluate for tx, offer tx, offer education and counseling and for exposing prisoners to a risk of infection as a result of these failures.
- Sought injunction requiring implementation of BOP clinical guidelines and “backscreening” of prisoners.
- ADA claim: denied medical services based on HCV+ status.

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**Anstett v. Oregon**

- **October 26, 2002:** Complaint filed.
- **August 27, 2003:** Second Amended Complaint filed.
- **May 14, 2008:** District Court finds:
  - Injunctive claims to be moot as Δs implemented BOP clinical guidelines and were backscreening prisoners;
  - Π Lacey (HCV-) lacks standing to bring a claim for deliberate indifference on behalf of uninfected prisoners; and
  - ADA claim fails (under old version of regs).
Anstett v. Oregon

- November 1, 2001: Plaintiffs file 299-page class action complaint seeking injunctive relief and money damages.
  - Among other things, they seek the creation of an expert panel to promulgate new clinical guidelines; elimination of current policy and its exclusions, infection control measures, education, etc.
  - Complaint cites a June 3, 1999 memo from D. Shelton stating: If there are any doubts about a patient's ability to comply with both the work-up and treatment, we should not begin evaluation.
  - Examples of specific provisions challenged:
    - HIV as absolute contraindication for tx.
    - Hx MDD as a relative contraindication for tx.
    - Frequency of LFTs.

- December 19, 2002: Court allows case to proceed as a class action.
- April 4, 2004: Parties agree to a settlement creating expert panel to review HCV clinical guidelines. Special Master appointed to oversee settlement.
- November 14, 2005: Expert panel submits its final recommendations to the Special Master, reflecting significant changes to the previous policies and clinical guidelines.

The Upshot...

Final Comments. These guidelines are meant to be just that—a guide for patients and physicians in the Oregon Corrections system. Patients do not lose their autonomy or responsibility for their health care within the Corrections system. Physicians do not lose their accountability to patients, their responsibility to modify their approaches for individuals, or their ability to modify an approach based on their individual judgment. None of these guidelines are meant to mandate testing or treatment. They are meant to mandate that patients and physicians be well informed, mutually consent to testing, treatment and the provision of both, and consider the needs of the large Corrections populations and the resources made available to Corrections.

Litigation: The Good

- Effect change on a large scale ("impact litigation")
- Set precedents that other jurisdictions can follow
- Obtain life-saving care for individual patients
- Serious consequences for failing to implement court-ordered relief
- Can educate/bring serious issues to the public's attention
- Create transparency and accountability
- The **** effect

Litigation: The Bad

- Expensive
- Time-consuming
- Risk of retaliation and adverse consequences
- Newly-imposed obstacles to bring class actions
- PLRA requirements
- Lack of attorneys willing to take cases
- Can set harmful precedents that other jurisdictions may follow
- Can educate/bring serious issues to the public's attention
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