



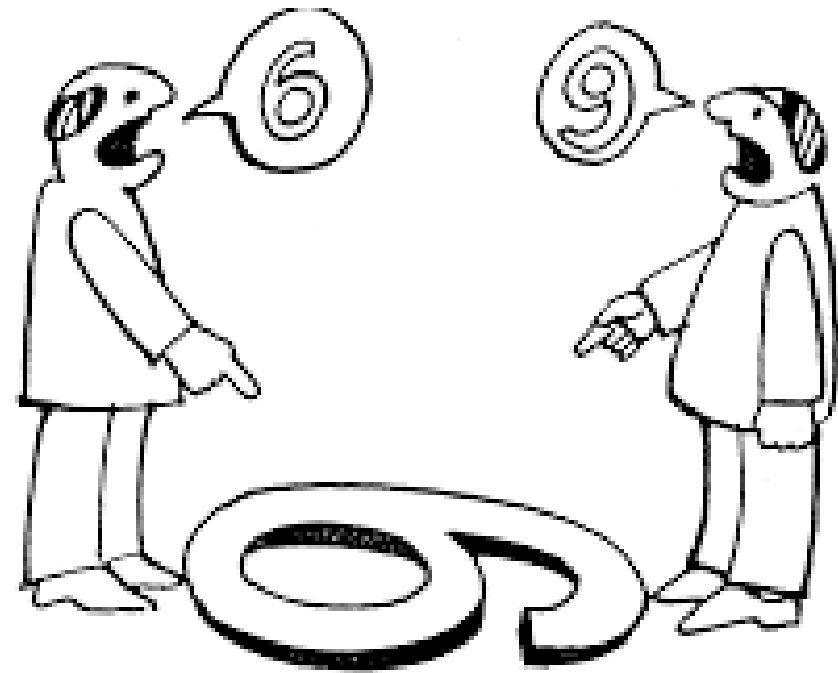
What Does Deliberate Indifference Look Like and How Can We Avoid It?


Dave Ferrainolo

*Ferrainolo Law Group, PA.,
Tampa, FL*

Jacqueline B. Sharuzi

*Sharuzi Law Group, Ltd.,
Denver, CO*





We do not have any relevant financial relationships with any commercial interests.

Disclaimer Statement:

- **This informational presentation was developed by independent experts. The information provided in this presentation is not the official position or recommendation of NCCHC but rather expert opinion. This information is not intended to be appropriate for every clinical situation nor does it replace clinical judgment.**
- **NCCHC does not endorse or recommend any products or services mentioned.**

4.11.1 Section 1983
Conditions of Confinement
Convicted Prisoner
Denial of Adequate Medical Care

Model

Because inmates must rely on prison authorities to treat their serious medical needs, the government has an obligation to provide necessary medical care to them. In this case, [plaintiff] claims that [defendant] violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to a serious medical need on [plaintiff's] part. Specifically, [plaintiff] claims that [briefly describe plaintiff's allegations].

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: [Plaintiff] had a serious medical need.

Second: [Defendant] was deliberately indifferent to that serious medical need.

Third: [Defendant's] deliberate indifference caused [harm] [physical injury] to [plaintiff].

Our Learning Objectives for Today

- Define the criteria for a finding against a correctional healthcare provider in a Section 1983 claim;
- Summarize Federal Court rulings on acceptable evidence of Deliberate Indifference in the correctional healthcare setting;
- Recognize what providers can change in training and charting to mitigate against a finding of Deliberate Indifference.

Where it all Started

Estelle v. Gamble
429 US 97 (1976)



It Started Simple Enough

“An inmate must rely on prison authorities to treat his [or her] medical needs; if the authorities fail to do so, those needs will not be met.”

Estelle at 106.

- 8-1 Decision
- Majority decision written by Justice Thurgood Marshall
- **HOLDING** = **Deliberate indifference** by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eight Amendment.
- Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

What is the Standard?

McGill v. Duckworth,
944 F.2d 344, 348 (CA 7, 1991)

Deliberate indifference requires a subjective standard of recklessness

Young v. Quinlan,
960 F.2d 351, 360-61 (CA 3, 1992)

A prison official is deliberately indifferent when he knows or should have known of a sufficiently danger to an inmate.

Farmer v. Brennan

511 U.S. 825 (1994)

We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.



In *Farmer*, the Supreme Court granted certiorari “because Courts of Appeals had adopted inconsistent tests for ‘deliberate indifference,’ ” and pointed to a decision from the Seventh Circuit requiring a “subjective standard” and the *Young* case from the Third Circuit adopting the “knows or should have known” standard. 511 U.S. at 832.

In resolving this conflict, *Farmer* expressly held:

*“a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement **unless the official knows of and disregards an excessive risk to inmate health or safety**; an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.”* 511 U.S. at 837-38.

The *Farmer* Court explained:

“[a] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious,” but cautioned, “When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly.” 511 U.S. at 842-43.

The Farmer Court Provides a Two-Part Test

Objective Part

- Does the inmate have a “sufficiently serious medical need”?
- “A serious medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” *Youmans v. Gagnon*, 626 F.3d 557, 564 (11th Cir. 2010)

Subjective Part

- Were the providers aware of the serious medical need and disregarded it?
- “A prison official must have a sufficiently culpable state of mind. . .” *Farmer*, 511 U.S. at 834.
- A prison official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”

*Lewis v.
McLean*
864 F. 3d 556
(7th Circuit, 2017)

7th Circuit Court of Appeals (2017)

Inmate James Lewis wakes up with pain in his back that goes from his head to his tailbone.

Lewis uses the emergency call button to call for help and speaks with a guard via the speaker system. The guard can see Lewis via camera.

Guards will not take Lewis to the infirmary until he can be cuffed.

Lewis cannot stand to be cuffed.

Guards refuse to enter cell until Lewis stands to be cuffed.

Lewis v. McClellan

864 F. 3d 556
(7th Circuit, 2017)

- 151 minutes after Lewis first called for help a doctor is contacted and instructs that Lewis needs to go to the hospital.
- Five guards enter Lewis's cell and he is taken to the hospital.
- Lewis is taken to the emergency room, gets Morphine and Ativan and is diagnosed with myalgia and muscle spasms. After about an hour and a half, Lewis is discharged with muscle relaxers and Ibuprofen.

Lewis sues alleging deliberate indifference for the 151 minutes he was delayed in getting to the hospital.

Lewis v. McClellan

864 F. 3d 556
(7th Circuit, 2017)

Farmer Objective Part

Does the inmate have a “sufficiently serious medical need”?

The 7th Circuit in *Lewis* expounds on the definition of a serious medical need: the condition does not have to be life threatening, it could be a condition, if not treated, that could result in significant injury or unnecessary infliction of pain. *Id.* at 563.

*Lewis v.
McClellan*
864 F. 3d 556
(7th Circuit, 2017)

Subjective Part

Were the providers aware of the serious medical need and disregarded it?

A delay in treatment may show deliberate indifference if it exacerbated the inmate's injury or unnecessarily prolonged his pain.

Unexplained delays in treatment may constitute deliberate indifference.

The Court was concerned with the lack of explanation for the inaction.

What Can We Learn from *Lewis*?


- Even a slight delay can support a claim of Deliberate Indifference.
- The inmate does not need to die or be severely injured (Lewis was fine after a few hours), but he suffered for 151 minutes before he got help.

***How can we
protect against
slight delays in
care?***

The Third Circuit has enumerated a number of scenarios supporting a finding of Deliberate Indifference

Deliberate Indifference exists, for example:

- ❖ “[w]here prison authorities deny reasonable requests for medical treatment ... and such denial exposes the inmate ‘to undue suffering or the threat of tangible residual injury’ ”;
- ❖ “where ‘knowledge of the need for medical care [is accompanied by the] ... intentional refusal to provide that care’ ”;
- ❖ where “necessary medical treatment [i]s ... delayed for non-medical reasons”;
- ❖ “where prison officials erect arbitrary and burdensome procedures that ‘result[] in interminable delays and outright denials of medical care to suffering inmates’ ”;

- 
- ❖ where prison officials “condition provision of needed medical services on the inmate's ability or willingness to pay”;
 - ❖ where prison officials “deny access to [a] physician capable of evaluating the need for ... treatment” of a serious medical need;
 - ❖ “where the prison official persists in a particular course of treatment ‘in the face of resultant pain and risk of permanent injury.’ ”

Caselaw: *Deliberate Indifference*

- ❖ Where the prisoner alleged that a three-month delay in replacing dentures was causing pain, this was sufficient to state a claim of deliberate indifference to serious medical needs. See, *Hunt v. Dental Dep't*, 865 F.2d 198, 200–01 (9th Cir. 1989).
- ❖ Where the prisoner alleged that an almost two-month delay in receiving any treatment for a fractured thumb, and a nineteen-month delay in being seen by a hand specialist, had caused pain and the diminished use of his hand because the fracture had healed improperly, this was sufficient to state a claim of deliberate indifference to serious medical needs. See, *Jett*, 439 F.3d at 1097–98.

Caselaw: *Deliberate Indifference*

- ❖ Where prison officials used pepper spray to quell a fight and the pepper spray vapors migrated into other inmates' cells, a four-hour delay in providing showers and medical attention to inmates suffering from harmful effects from the pepper spray vapors may violate the Eighth Amendment. See, *Clement*, 298 F.3d at 905–06.
- ❖ Prolonged deprivation of toothpaste can violate the Eighth Amendment. *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005).

Caselaw: *Deliberate Indifference*

- ❖ “[A]llegations that a prison official ignored the instructions of a prisoner’s treating physician are sufficient to state a claim for deliberate indifference.” *Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.

Caselaw: What is Not Deliberate Indifference

- ❖ A difference of opinion between the physician and the prisoner concerning the appropriate course of treatment does not amount to deliberate indifference to serious medical needs. See *Hamby*, 821 F.3d at 1092 (“Eighth Amendment doctrine makes clear that ‘[a] difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.’” (citation omitted)); *Toguchi*, 391 F.3d at 1058; *Jackson*, 90 F.3d at 332; *Franklin v. Or., State Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981).

Caselaw: What is Not Deliberate Indifference

- Similarly, a prisoner has no constitutional right to outside medical care to supplement the medical care provided by the prison even where the prisoner is willing to pay for the treatment. See *Roberts v. Spalding*, 783 F.2d 867, 870 (9th Cir. 1986).
- To establish that a difference of opinion amounted to deliberate indifference, the prisoner “must show that the course of treatment the doctors chose was medically unacceptable under the circumstances” and “that they chose this course in conscious disregard of an excessive risk to [the prisoner’s] health.” See *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996);

Suicide Cases

Farmer Court

Objective Part

- Does the inmate have a “sufficiently serious medical need”
- Suicidal ideations, threats, plan constitute a serious medical need.

Subjective Part

- Were the providers aware of the serious medical need and disregarded it?

4.11.2 Section 1983
Conditions of Confinement
Convicted Prisoner
Failure to Protect from Suicidal Action

Model

- Because inmates must rely on prison authorities to treat their serious medical needs, the government has an obligation to provide necessary medical care to them. If an inmate is particularly vulnerable to suicide, that is a serious medical need. In this case, [plaintiff] claims that [decedent] was particularly vulnerable to suicide and that [defendant] violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to that vulnerability.
- In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove the following three things by a preponderance of the evidence:

First: [Decedent] was particularly vulnerable to suicide. [Plaintiff] must show that there was a strong likelihood that [decedent] would attempt suicide.

Second: [Defendant] was deliberately indifferent to that vulnerability.

Third: [Decedent] [would have survived] [would have suffered less harm] if [defendant] had not been deliberately indifferent.

***Conner v.
Scott Rubin-
Asch,***
No. 19-1626
(7th Cir. 2019)

- Inmate Connor had a history of suicide attempts
- Threatened harm to himself upon arrival at facility.
- Conner was placed on clinical observation
- Connor tells doctor he is no longer contemplating self harm and is released from clinical observation
- The next day, Connor attempts suicide and is placed back on clinical observation
- After several weeks Connor refused to talk with doctors.
- Prison psychologist Dr. Rubin-Asch removed Connor from clinical observation because he had not demonstrated recent suicidality (16 days had passed since his last attempt). This action was taken in the hopes that Connor would agree to talk with medical staff.
- Upon learning that he will be taken off clinical observation, Connor tells everyone he will harm himself if the order is carried out.
- Connor made a suicide attempt after being removed from clinical observation, but was not injured.

Conner v. Scott Rubin- Asch,

No. 19-1626
(7th Cir. 2019)

- Connor sued alleging that Rubin-Asch violated the 8th Amendment by removing him from clinical observation.
- Seems cut and dry that Connor never should have been released from clinical observation, right?
- Connor had a history of suicide attempts, had tried suicide while at the facility and said he would do it again if released from clinical observation.

***How could a Court or
Jury find not find in
favor of Connor?***

What If I told you:

Connor threatened self harm upon arrival so he could get a private cell, not to harm himself?

Connor's 1st suicide attempt involved him affixing a bedsheet to his neck and a shower head, but his feet never left the ground and he never attempted to hang himself. He was uninjured.

Connor's 2nd suicide attempt involved him climbing a prison fence with a sheet tied around his neck, but he agreed to climb down without attempting to harm himself.

Other attempts by Connor were stopped short of serious attempt

The suicide attempt that Connor sued over involved a one minute episode where he attached a piece of clothing to his neck and his showerhead, but removed it when a guard threatened to intervene.

Knowing these facts,
is this still an
open and shut case of
Deliberate Indifference?

Professional Judgment

- The Court held that a jury could not find that the psychologist disregarded a known, substantial risk of harm because Rubin-Asch made a reasoned decision that removing Connor from clinical observation was safe and best for his mental health needs
- Rubin-Asch had charted more than once that Connor's suicide attempts were not to hurt himself, but to gain a private cell.

Rubin-Asch's decision was well reasoned and based on his professional judgment.

*Training and Charting to Mitigate
Against a Finding of
Deliberate Indifference*

Training

- Ensuring that all requests for medical (including kites) are responded to in a timely manner.
 - What is “timely”? – it depends.
- Ensuring collaboration between security and medical to make sure no requests for medical are disregarded.
- Ensuring that all responses and interactions are documented in the EMR.
 - To the extent requested medical care is denied or delayed, thorough documentation of reasons for same.

Why is Charting Important?

- Charting creates continuity of care for patients
- Charting provides a roadmap of care in the event of litigation
 - Litigation may arise YEARS following care
- Your charting speaks for you in litigation
- Plaintiffs' attorneys will argue that "if it was not documented, it did not happen"

What Do We Use to Defend Your Care?

The Medical Record is the “Best Evidence”

The records you generate tell the story of the care rendered

- Contemporaneous record – before any lawsuit
- Used to establish the timeline of events
- Record every test, every medicine, every lab, etc.
- Records should be legible, organized and complete
- Document all significant communications

What Do We Use to Defend Your Care?

If the chart is complete and legible and there are no blanks or gaps in time, there is less opportunity for the plaintiff and their experts to “read into” the chart events that did or did not happen.

Remember, the Plaintiff’s expert will argue that:

“If it is not documented, it did not happen”

Golden Rules of Documentation

- Legible
- Accurate
- Objective (no subjective opinions)
 - Do Not Editorialize
- Timely
- Chronological
- Responsive to care rendered

Documentation's Role in Litigation

- Documentation is the only **historical record** of the patient's care
- Documentation has more credibility than testimony because it is **created contemporaneously**
- Documentation is the best tool in defense of a negligence claim
- Without documentation, we have little evidence to support our argument that you acted within the Standard of Care and not with Deliberate Indifference.

Text messages / e-mails / any electronic communications are

ALL DISCOVERABLE

Documentation Pitfalls

- Holes / Omissions / Gaps in Time
- Conflicts / Contradictions / Unclear Orders
- Undocumented Communications / Absence of Communications
- Clinical Changes in Condition Not Documented
- Accusations / CYA Charting / Exclamation Points
- Opinions in Records and Reports
- Inconsistent Charting
- Failure to Document Conferences with Physicians
- Invalid Consents / Refusal to Treat
- Incomplete Nursing Entries
- Improperly Corrected Notes
- Irrelevant Information
- Lost or Missing Evidence / Equipment

What Did We Learn Today?

- The criteria for a finding against a correctional healthcare provider in a Section 1983 claim;
- Key Federal Court rulings on acceptable evidence of Deliberate Indifference in the correctional healthcare setting;
- Training and charting to mitigate against a finding of Deliberate Indifference.

Citations

- Monica J. Raven, Neither Cruel Nor Unusual; An Hour and a Half Delay in Treatment Can Now Amount to Deliberate Indifference, 13 Seventh Circuit Rev. 124 (2017) at <https://www.kentlaw.iit.edu/sites/ck/files/public/academics/jd/7cr/v13/raven.pdf>
- Supreme Court Defines "Deliberate Indifference" in Prison Rape Case. Published in Prison Legal News July, 1994, page 1
- Professional Judgment or Deliberate Indifference? Suicide Under the Eighth Amendment. By Brad Taylor Mar 17, 2020 2020 U. Ill. L. Rev. Online 60
- United States Court of Appeals for the Third Circuit Model Civil Jury Table of Contents and Instructions. Chapter 4: Instructions for Civil Rights Claims Under Section 1983

More Citations

- KNOW YOUR RIGHTS MEDICAL, DENTAL AND MENTAL HEALTH CARE ACLU National Prison Project
- CACI No. 3041. Violation of Prisoner's Federal Civil Rights - Eighth Amendment - Medical Care (42 U.S.C. § 1983), Judicial Council of California Civil Jury Instructions (2020 edition)