PROFESSIONAL JUDGMENT OR DELIBERATE INDIFFERENCE? SUICIDE UNDER THE EIGHTH AMENDMENT

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A deliberate indifference claim under the Eighth Amendment can arise from myriad circumstances that prisoners face. This article examines the subtle nuances of the deliberate indifference standard as it concerns the suicide or attempted suicide of a state prisoner, with special emphasis on how the professional judgment standard impacts liability. Plaintiffs and defendants are well-advised to give special consideration to the unique factual, medical, and legal aspects of civil rights cases stemming from a prisoner's suicide or attempted suicide.

Suicide is, without exception, a tragedy. Even an unsuccessful suicide attempt can be physically and emotionally devastating. In addition to self-harm, the act ripples outward, wounding friends and loved ones in indescribable ways. Those wounds are difficult to heal and impossible to forget. Many survivors, rightfully, seek vindication through legal process. The suicide or attempted suicide of an incarcerated prisoner, for example, may give rise to an Eighth Amendment deliberate indifference claim against prison officials and healthcare providers.[1] *In those cases, attorneys must separate the substantial emotional consequences of the act from objective facts, medical opinions, and sound legal reasoning in order to determine whether a claim is realistically viable. While all suicide attempts are medical emergencies and need to be taken seriously, not all suicides or attempts will give rise to civil liability.*

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The author thanks Joseph Rupcich, Partner at Cassiday Schade's Springfield office, and all the attorneys and legal support staff of the firm's Springfield office for their invaluable insight, constant comradery, and incredible support.

1. West v. Atkins, 487 U.S. 42, 54 (1988) ("[A] physician employed by [a state] to provide medical services to state prison inmates, acted under color of state law for purposes of § 1983 when undertaking his duties in treating petitioner's injury. Such conduct is fairly attributable to the State.").

HOW SUICIDE IMPLICATES THE EIGHTH AMENDMENT

As a bedrock principle, it is important to note that under the Eighth Amendment, prison officials owe prisoners a duty to ensure their "reasonable safety,"[2] and to provide adequate medical care.[3] The risk of suicide lies at the intersection of these two duties. The duties to provide reasonable safety and adequate medical care, however, do not require prison officials and healthcare providers to prevent every conceivable injury or ailment.[4] A medical professional who knows of a prisoner's objectively serious risk of harm, but responds reasonably "cannot be found liable under the Cruel and Unusual Punishments Clause."[5] The U.S. Supreme Court briefly alluded to this point in *Estelle v. Gamble*:

> This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain. . . . Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth 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.[6]

To state a claim of "deliberate indifference to serious medical needs" under the Eighth Amendment, a plaintiff must show (1) that the risk of harm was objectively serious, and (2) the official consciously knew of, but disregarded that serious risk of harm.[7] As to the first element, a risk of suicide is "an objectively serious medical condition, and it is well established that inmates have the right to be free from deliberate indifference to this risk while in custody."[8] As such, a court need not engage in lengthy analysis to determine whether a risk of suicide

2. Farmer v. Brennan, 511 U.S. 825, 844 (1994) ("A prison official's duty under the Eighth Amendment is to ensure 'reasonable safety.'") (quoting Helling v. McKinney, 509 U.S. 25, 33 (1993)).

3. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) ("Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.").

4. *Id.* at 105.

5. *Farmer*, 511 U.S. at 845.

6. *Estelle*, 429 U.S. at 105–06.

7. *Farmer*, 511 U.S. at 834, 837 ("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.").

8. Lisle v. Welborn, 933 F.3d 705, 716 (7th Cir. 2019) (citing Estate of Clark v. Walker, 865 F.3d 544, 551 (7th Cir. 2017)).

is an objectively serious medical need; case law in the Seventh Circuit has established that it is.[9]

WHAT IS DELIBERATE INDIFFERENCE TO A RISK OF SUICIDE?

A recent opinion by Seventh Circuit Court of Appeals is helpful to understand the subjective knowledge requirement of deliberate indifference in the context of suicide.[10] In *Conner v. Rubin-Asch*, the Seventh Circuit outlined how the deliberate indifference standard applies when a plaintiff alleges that prison officials violated his Eighth Amendment rights by failing to prevent his suicide attempt.[11] The plaintiff, Eric Conner, was incarcerated in the Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin.[12] Conner had a "long history of threatening suicide and attempting to harm himself" while incarcerated.[13] Based on the facts, however, there was some genuine dispute as to the sincerity of those threats. On at least one occasion prior to the events of the case, Conner threatened self-harm as a means to secure a private cell and a facility transfer.[14] Conner first attempted suicide at the WSPF in February 2017, by tying a bedsheet to a showerhead and then wrapping it around his neck.[15] Despite the attempt, Conner apparently suffered no injuries.[16] Afterwards, prison officials placed Conner under clinical observation in the psychological services unit (PSU).[17]

By early March of 2017, Conner reported that he was not having thoughts of self-harm and was subsequently released from clinical observation.[18] The following day, however, Conner tied a sheet to his neck and climbed a fence in another apparent suicide attempt.[19] PSU staff was able to talk Conner down from the fence, and he again suffered no physical injury from his apparent suicide attempt.[20] Prison officials returned Conner to clinical observation, this time until April 20, 2017.[21] While under clinical observation, Conner made several additional self-harm attempts or simulations, including hitting his head on a window and wrapping a security smock around his neck but would not engage in dialogue with PSU staff or an outside psychiatrist.[22] On April 20, 2017, the prison's supervisory psychologist, Dr. Rubin-Asch, ordered that Conner be removed from clinical observation "because he had not demonstrated recent suicidality."[23] At

9. *Id.*
10. Conner v. Rubin-Asch, 2019 U.S. App. LEXIS 32880 (7th Cir. 2019).
11. *Id.*
12. *Id.* at 1.
13. *Id.*
14. *Id.*
15. *Id.* at 1–2.
16. *Id.* at 2.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 2–3.
22. *Id.*
23. *Id.* at 3.

the time, Dr. Rubin-Asch believed that removing Conner from clinical observation would encourage "constructive dialogue with psychological staff."[24] After learning of his removal, Conner informed security staff (who in turn informed Dr. Rubin-Asch) that he "would harm himself if he was forced off clinical observation."[25] Hours after being removed from the PSU, Conner tied some clothing around a showerhead and his neck in another apparent attempt to strangle himself.[26] When security staff moved to intervene, Conner voluntarily untied the clothing from his neck and Conner was left unharmed.[27] These facts and events were important because they informed both parties' arguments. Namely, Conner cited his repeated attempts and simulations as evidence that Dr. Rubin-Asch knew that Conner was suicidal, while Dr. Rubin-Asch asserted that the evidence supported his professional judgment that Conner should be removed from the PSU because he was not sincere in his suicidal tendencies.[28]

Conner filed suit against Dr. Rubin-Asch, among others, for violation of his Eighth Amendment rights.[29] Specifically, Conner alleged that Dr. Rubin-Asch had deliberately indifferently ignored a substantial risk of serious harm by removing him from clinical observation, despite his threat of self-harm.[30] Both parties moved for summary judgment.[31] "To survive summary judgment on his deliberate indifference claims, Conner needed evidence from which a reasonable jury could find that the defendants knowingly and unreasonably failed to respond to an objectively serious risk of harm."[32]

The Seventh Circuit focused its analysis on how the risk of suicide should be analyzed under the subjective element of deliberate indifference. The court noted that a plaintiff must show the defendant "(1) subjectively knew the prisoner was at substantial risk of committing suicide and (2) intentionally disregarded the risk."[33] This requires actual knowledge and is, therefore, a higher standard than "mere or gross negligence," which requires that a defendant simply *should* have known of the danger.[34] Further, a medical decision is entitled to deference, unless that decision was "a substantial departure from accepted professional judgment."[35] This deference effectively precludes a finding of deliberate indifference, even if the medical decision turned out to be erroneous.

In *Conner*, the Seventh Circuit found that the plaintiff produced no evidence from which a "reasonable jury could [] find that [Dr. Rubin-Asch] had intentionally disregarded a known, substantial risk of harm because Rubin-Asch made a reasoned decision that removing Conner from clinical observation was

24. *Id.*
25. *Id.*
26. *Id.* at 4.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 5.
31. *Id.*
32. *Id.* at 5–6 (citing *Farmer*, 511 U.S. 825, 844–45 (1994)).
33. *Id.* at 6 (quoting Collins v. Seeman, 462 F.3d 757, 761 (7th Cir. 2006)).
34. *Id.* (quoting Matos v. O'Sullivan, 335 F.3d 553, 557 (7th Cir. 2003)).
35. *Id.* at 7 (quoting McGee v. Adams, 721 F.3d 474, 481 (7th Cir. 2013)).

safe and was the best decision for Conner's mental health needs."[36] "Rubin-Asch made a professional judgment based on his own observations that Conner was not a current threat to himself."[37] The court deferred to Dr. Rubin-Asch's medical decision because Conner did not show that it was a "substantial departure from accepted professional judgment."[38] As this ruling turned on the defendant's mental state, the outcome would have presumably been the same even if Conner had been successful in his suicide attempt.

WHAT LITIGATORS NEED TO KNOW

This ruling underscores how powerful professional deference can be in Eighth Amendment deliberate indifference cases. Dr. Rubin-Asch exercised his professional medical judgment by removing Conner from clinical observation, and Conner consequently attempted, or at least simulated, suicide.[39] The objective seriousness of Conner's risk of harm was never in question–a risk of suicide is always objectively serious. The real question was whether Dr. Rubin-Asch's professional medical decision was so deficient that "no minimally competent professional would have so responded under those circumstances."[40] Conner could not show that Dr. Rubin-Asch's decision had so deviated from the professional standard that it was no longer entitled to deference.[41] Consequently, not only was Dr. Rubin-Asch entitled to judgment as a matter of law, so too were the corrections officers who relied on his professional judgment when they removed Conner from the PSU.[42]

Another way of looking at the deferential standard of professional judgment is through the lens of reasonableness. Prisoners are entitled to "reasonable safety," but not protection from every feasible harm or illness.[43] A prison official who "responded reasonably to the risk" will not be liable for deliberate indifference, "even if the harm ultimately was not averted."[44] The professional judgment standard is a means by which to gauge the reasonableness of a professional's decision. Most lawyers and judges are laypersons when it comes to medical knowledge, and therefore must defer to the judgment of medical professionals in regards to medical decisions. As such, only when "no minimally competent pro-

36. *Id.* at 6.

37. *Id.* at 8.

38. *Id.*

39. *Id.*

40. Sain v. Wood, 512 F.3d 886, 894–95 (7th Cir. 2008) ("In the context of medical professionals, this standard also has been described as the 'professional judgment' standard: A medical professional is entitled to deference in treatment decisions unless 'no minimally competent professional would have so responded under those circumstances.'") (quoting Collignon v. Milwaukee County, 163 F.3d 982, 988 (7th Cir. 1998)).

41. *Conner*, 2019 U.S. App. LEXIS 32880 at *6.

42. *Id.* at 7 ("And, finally, the correctional-officer defendants who extracted Conner from his cell were entitled to rely on Rubin-Asch's professional opinion that Conner no longer belonged under clinical observation.").

43. Farmer v. Brennan, 511 U.S. 825, 834 (1994) ("It is not, however, every injury suffered . . . that translates into constitutional liability for prison officials responsible for the victim's safety.").

44. *Id.* at 844.

fessional would have so responded under those circumstances" will a court determine that a medical professional acted unreasonably for Eighth Amendment purposes.[45]

Consequently, Plaintiffs' attorneys have a high bar to clear in suicide-related Eighth Amendment deliberate indifference cases, at least against medical professionals. Plaintiffs must show that the defendant actually knew the plaintiff or decedent was at risk of committing suicide and either intentionally did nothing to prevent it, or responded so deficiently that no "minimally competent" medical professional would have so responded.[46] That will usually require expert testimony, or medical literature on the standard of care applicable, as well as specific factual information, likely from the plaintiff's medical records or prior admissions from the defendant,[47] showing how the defendant medical professional breached that standard of care. Even that, however, will not be enough to survive summary judgment if the evidence merely suggests a breach in the standard of care without suggesting that no "minimally competent" professional would have made a similar decision.[48] In total, a plaintiff must produce evidence that, in light of accepted medical practice, the defendant's medical decision was not only erroneous, but so unreasonable under the circumstances as to demonstrate "a complete abandonment of medical judgment."[49]

Defense attorneys, on the other hand, should seek to offer evidence that the medical professional's decision is entitled to deference. This evidence can be found in numerous places: medical records documenting the plaintiff's care, prison disciplinary records supporting a reasonable inference that plaintiff was not genuinely suicidal, an affidavit from the defendant elaborating on the justification for the medical decision, medical literature, or expert testimony from a licensed medical professional.[50] The medical decision need not have been correct to bar liability under the Eighth Amendment; it merely needs to have been reasonable at the time it was made.[51] In *Conner*, Dr. Rubin-Asch was able to produce evidence that the plaintiff's "attempts at self-harm were not genuine" and therefore, his decision to remove Conner from clinical observation was reasonable and entitled to deference.[52] Because a prison official who acts reasonably "cannot be found liable under the Cruel and Unusual Punishments Clause," Dr. Rubin-Asch was entitled to judgment as a matter of law.[53] It is important to

45. *Sain*, 512 F.3d at 894–95 (7th Cir. 2008).

46. *Id.*

47. Lisle v. Welborn, 933 F.3d 705, 717 (7th Cir. 2019) ("Here, Lisle alleges that South was deliberately indifferent to his risk of suicide by taunting him for being unsuccessful and actually encouraging Lisle to kill himself while he was in the infirmary on suicide watch. Assuming Lisle's account is true, as we must, South's statements could be deemed cruel infliction of mental pain and deliberate indifference to his risk of suicide, making summary judgment improper.").

48. *Sain*, 512 F.3d at 894–95 (7th Cir. 2008).

49. Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) (citing Estate of Cole v. Fromm, 94 F.3d 254, 262 (7th Cir. 1996)).

50. Conner v. Rubin-Asch, 2019 U.S. App. LEXIS 32880 at *16–*23 (7th Cir. 2019).

51. *Id.* at *23.

52. *Id.* at *6.

53. Farmer v. Brennan, 511 U.S. 825, 845 (1994).

reiterate that, because professional judgment standard turns on the defendant's knowledge and actions, a "reasonable" response will always preclude liability, no matter the outcome.[54]

CONCLUSION

Suicide, or even an attempt, is a tragic event that has serious consequences in both the medical and legal fields. As a corollary, legal professionals handling cases involving suicide or suicide attempts must give special consideration to its implications under the Eighth Amendment. Plaintiffs face high hurdles to prove deliberate indifference, while defendants need to carefully support the reasonableness of their decisions, sometimes in spite of terrible consequences. The Seventh Circuit's framework for establishing deliberate indifference balances the serious risk of harm that suicide presents with the necessity for deference of reasonable medical decisions. Attorneys on each side need to account for both, by citing support from the factual record, to successfully represent their clients. Plaintiffs' attorneys must acknowledge the professional judgment standard to overcome it and defense attorneys must recognize the devastating consequences of suicide to convincingly argue against liability.

54. *Conner*, 2019 U.S. App. LEXIS 32880 at *23.