

Appendix B

Civil Liability: Implications for Corrections/ Detention Officers

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I. Introduction

In plain language, **civil liability** is the legal obligation or responsibility of a person to compensate a person whom he/she has injured. The injury can be personal, or it can be an injury to property or rights. Liability can be incurred regardless of whether the injury was inflicted intentionally or by accident.

When a court holds a person civilly liable for someone's injury, the jury (or judge in a non-jury trial) also decides how much money it will take to compensate the injured party for the injury. This award is called **damages**. Damages can be awarded as compensation for all kinds of kinds of injuries, including some things that are hard to value in monetary terms. Nonetheless, juries routinely find ways to assign values to such things as violation of the 4th Amendment's guarantee of protection from unlawful search and seizure or the value of a diminished personal reputation in a libel suit.

A basic concept of the law of civil liability – the law of torts, as lawyers call it – is that of fault. We only make people liable for injuries that they have caused by means of behavior that we consider somehow a departure from ordinary, prudent behavior. In other words, people are at fault where their behavior is such that it departs from the ordinary standard of behavior that respects the safety, property and rights of others. When they violate that standard – which lawyers

call the duty to exercise due care – and an Handbook injury results, we consider it fair to hold them liable and require them to compensate the injured party.

Fault, or failure to exercise due care, can be of two basic kinds. The first is **intentional**. When we use the term “intentional tort” we are describing an action that a person – called a “tortfeasor” – takes deliberately with the intention of injuring another person, his property or his enjoyment of protected rights. The simplest example is a battery; i.e., an intentional, unconsented touching of another person. A punch in the nose, a poke in the chest, unauthorized surgery, a cream pie in the face, are all if the contact is intentional, batteries and intentional torts.

The other class of torts, or injuries caused by a departure from the duty to exercise due care, is called unintentional torts. What is unintended in an unintentional tort, is to cause a specific injury to a specific person. The essence – or gravamen, as lawyers say – of this sort of a tort is the departure from the duty to exercise due care. What happens is that the tortfeasor intentionally does something, but that something has an unintended result; i.e., someone gets injured. We use the term **negligence** to describe this sort of conduct. There are many examples of unintentional torts to be drawn from everyday experience. If you, for example, cover a hole in the floor with a rug, most people would think your action was negligent. If you did it with the intent of injuring your mother-in-law, your landlord or some other person you knew would presently come along, it would be an intentional tort. The difference between negligent and intentional behavior is that intentional behavior leads to an intended result while negligent behavior really means behavior that creates a risk or injury to unspecified people, injury that is the logical and foreseeable result of behaving in that manner.

II. Nonfeasance

The topic of the materials of which this essay is part is that of custodial suicide. This essay seeks specifically to describe those situations in which a police officer, a correction officer or the officer charged with

the care and custody of a detainee, a prisoner or other person who is lawfully deprived of his freedom can be held liable for a suicide. In view of the above introductory discussion, the question will instantly arise in the reader's mind: how can it be considered any person's fault that another person has taken his/her own life? After all, suicide would seem to be a voluntary act.

To understand how this can happen, it is necessary to understand a further concept of the tort law. That is the concept of **nonfeasance**. Nonfeasance is simply an old-fashioned word that means that a person has not done something that he/she was supposed to do. In the first year of law school, students are usually introduced to this concept by the example of a person who is drowning while a number of people are watching from the safety of the beach. Although no one would be well thought of for failing to render aid, students learn that the law does not impose a duty on the average person to risk his life to save another from harm. You cannot be sued or prosecuted for failing to save the drowning man. But you might ask: what about a lifeguard? Doesn't the lifeguard have a duty to act? And if the lifeguard doesn't act, can he/she be held liable? The answer to both questions is yes. Liability for a nonfeasance does not arise from some general duty that people have to prevent injuries to other people. In almost every instance, there has to be some special relationship between the injured person and the one who failed to prevent the injury. Sometimes this is because there is a contract that makes it the duty of someone, like the lifeguard in the above example, to protect other people from harm. The lifeguard has, in effect, promised, in return for his salary, to rescue people who are drowning. If he sees someone going under and decides to do nothing, he can be held liable for a sort of intentional tort. If he happens to be away from his post when the accident happens, it is a species of unintentional tort.

Other sorts of special relationships on which liability for a nonfeasance may be premised are those, for example, where one party has promised the other that he/she will do something for the other. A celebrated

example of this is a case in western New York where a woman had been assured that the police would be watching over her house to protect her from her estranged husband; a violent man who had threatened her life. She stayed at home, relying on the police promise of protection. However, the police did not, in fact, have a patrol in the area. The estranged husband showed up and carried out his threat. Was the police department liable? **Zibbon vs Town of Cheektowaga**, 53 AD2d 448 (4th Dept. 1979). Yes, it was. Would an individual officer who made, then broke, a similar promise be liable? Probably, he would be.

III. Duty of Care in Custodial Situations

This brings us to a discussion of the liability of persons and agencies charged with the care and protection of prisoners and other detainees. Most people, and certainly people who work in law enforcement and corrections, know that correctional and detention facilities are potentially dangerous places. They harbor inmates who are, in general, antisocial and many who are prone to violence. Many suffer from drug addiction and personality disorders. Assault and other violent activity are a constant threat to inmates within these institutions. Inmates are deprived of rights, of privacy, of the means to protect themselves.

People who are suddenly thrown into such circumstances will respond in a variety of ways. Some adjust and survive. But for some, it is an overwhelming experience. Some are so overwhelmed that they attempt to take, and may succeed in taking, their own lives. These are the conditions of detention and imprisonment. Everyone in the business, so to speak, knows this. The prison or detention facility administration and its officers, certainly, are presumed to know of these conditions. They are also charged with the duty to keep prisoners and detainees in their custody safe. **Wilson vs Sponable**, 81 AD 2d 1,5, **appeal dismissed** 54 NY 2d 834 (1981). When you put the presumed knowledge of the dangers inherent in detention or imprisonment together with the duty to protect a person in custody, it is fairly clear that at least part of the duty to exercise due care with respect to the safety, health and welfare of prisoners is

a duty to protect them from those inherent dangers. In the words of a famous old case: *"The risk reasonably to be perceived defines the duty to be obeyed."* *Palsgraf vs Long Island Railroad Co.*, 248 NY 339, 3344 (1928). That statement applies whether it means that a lifeguard should know about undertow, cramps, sharks and other dangers inherent in the activity of swimming or that a sheriff's deputy charged with custody of detainees should know that some detainees will attack and brutalize others will be self-destructive.

In particular cases, New York courts have held that correction officials have "a duty to provide inmates with reasonable protection against foreseeable risks of attack by other prisoners." *Sebastiano vs New York*, 112 AD 562, 564 (1985). Many courts have also recognized that custodians must provide for adequate medical care and other basic services that affect the health and safety of inmates. *Estelle vs New York*, 429 US 97 (1976).

IV. Foreseeability of Suicidal Behavior

Now, we turn to the question of when suicide is foreseeable enough to justify holding law enforcement and corrections officers and agencies liable for its occurrence. In New York, there have been a number of cases decided that do indeed hold that law enforcement and corrections officers and their employers may be held liable for failure to prevent a suicide by a prisoner or detainee. Cases dealing with mental patients and prisoners clearly establish that the state has a duty of supervision with respect to a suicidal person in its care and custody. *Wilson vs Sponable, supra*. The duty to protect a suicidal person from killing himself has been further extended to include a Sheriff as well as those in charge of a reform school. *Lavigne vs Allen*, 36 AD 2d 981 (3rd Dept. 1981); *McBride vs State of New York*; 52 Misc. 2d 880 (Ct Cl. 1967). There are limits to this duty. No basis has been found that would expand the duty to protect detainees from their own suicidal behavior by providing separate facilities, extra staff, and around the clock psychiatric care. *Comiskey vs State of New York*, 71 AD 2d 699 (9180). The standard is that liability attaches where

suicide is a hazard reasonably to be foreseen or a risk reasonably to be perceived. *Flaherty vs State of New York*, 296 NY 342, 346 (1947). The exercise of due care would require that steps be taken that reasonably would prevent such suicides.

Unfortunately, not all law enforcement or corrections officials are trained in evaluating persons and diagnosing personality or emotional disorders that may lead to attempts at suicide. It would be unfair to expect them to make such diagnoses. And, in fact, that is not really what the appropriate standard of care would require. Due care is, in reality, common sense informed by the knowledge and experience of the person who is expected to exercise it.

It is fairly common knowledge, for example, that certain kinds of people will be more severely affected by the experience of arrest and detention than others. These people pose the greatest risk of suicide attempts as a response to arrest and confinement. Persons under the influence of drugs or alcohol, for instance, are considered high risks because they tend to become severely depressed when the effects of these substances wear off. The problem is especially acute where the intoxication or drug use has led to some criminal act such as vehicular homicide. Guilt, fear, hopelessness and depression are quite foreseeable under such circumstances.

Persons of some status in the community who are arrested for some particularly shocking or shameful crime may become severely depressed. A man of respectable middleclass background who is charged with a sex offense or child abuse may become quite despondent while in custody. Such a person would be more likely than many others to attempt suicide.

Persons known to have been exhibiting obvious symptoms of mental illness also pose a risk of self injury or suicide. Often, their history of problems is known to their custodians. If it is, there is reason to believe that the inmate is more likely to engage in self-destructive behavior than others. Other ways in which officers may learn of a high

potential for suicidal behavior might be their own previous experience with the detainee, the opinion of a mental health professional or because they have received warnings from the detainee's family or acquaintances. Knowledge like this constitutes notice of the special risk posed by the detainee and gives rise to the duty to take precautions that are reasonably calculated to reduce the risk.

V. Preventive Measures

At the general level, administrators and supervisors of detention and corrections facilities are required to recognize the risk of suicide by detainees and to provide for regulations and procedures that minimize that risk. Such regulations at their most general include confiscation of personal items, such as belts and other articles of clothing, that might be used to facilitate a suicide. Any departure from such regulations may supply the necessary negligence to establish liability should a suicide result. **Young vs City of Ann Arbor**, 119 Mich. App. 512, 326 NW 2d 547 (9182).

More recently, with the helpful collaboration of mental health professionals, procedures have been developed for screening inmates and detainees to identify those who pose a particular risk of suicide. This screening is supplemented by procedures that come into play once an inmate has been identified as a high risk. These may include special detention quarters, surveillance and consultation with mental health professionals.

With regard to specific detainees, if there is some notice that the detainee poses a particular and immediate risk of suicide, persons who have actual knowledge of this risk may be held liable if they depart from any prescribed procedure for dealing with such detainees or if they fail exercise due care above and beyond such procedures. **Wilson vs Sponable, supra; McBride vs State of New York, supra**. When such a case comes to trial, the question of whether the suicide was foreseeable and the question of whether custodians acted negligently in not preventing it are both questions of fact to be decided by the jury (or the court in a nonjury trial). **Lavigne vs Allen, supra**.

VI. Limits to Liability

There is a limit to exposure to liability. Unfortunately, it is not as precisely defined as we might wish. In the area of State liability for suicides of mental patients committed to State care, the courts have said that a hospital is not an insurer of the safety of its patients. That is to say, there is no strict liability. In a mental hospital, committees are present because they are mentally ill. They are in the care and custody of people who know more about mental illness and the likelihood of suicide than any police officer or corrections officer ever could. And yet, there have been suicides for which such hospitals and their staffs have not been held liable. Even where a patient's suicidal tendencies are known or suspected, the State or a State hospital is held only to a reasonable standard of care, and is not required to maintain constant, unremitting, individual supervision over each patient so afflicted. *Fowler vs State*, 192 Misc. 15, 18 NYS 2d 860 (1948); *Brigante vs State*, 33 NYS 2d 354 (Ct. Cl. 192). The same recognition of the fiscal, logistical and even architectural limitations on the ability of corrections and detention facilities to prevent suicides of inmates have been acknowledged by the courts. *Wilson vs Sponable, supra* pp 69; *Comiskey vs State*, 71 AD 2d 699. (1969).

VII. Liability Under Federal Civil Rights Law

As a postscript, the reader should be aware that the foregoing discussion is about liability of officers and their supervisors and employers under State law. There are other laws that apply in the custodial suicide situation. The most notable of these is 42 USC, section 1983, also known as The Civil Rights Act of 1971. This law permits a person whose constitutionally protected rights have been violated by a person who acts on behalf of a state government to sue the violator for civil damages in the federal courts. In recent years, the United States Supreme Court has held that a "person," within the meaning of this statute, maybe a police or sheriff's department, a municipal government or other agency of state or local government. As a result, there is

considerable incentive to use this statute as a means of bringing a municipal party into lawsuits because of such a party's "deep pockets."

In the area of custodial suicide and self inflicted injuries, there are a number of theories under which these actions are brought. The most important of these would be based on the fact that mental illness that leads to many suicides is, ultimately, a medical condition. Failure of the custodian to provide treatment or preventive measures may be a violation of the duty to provide reasonable medical care to persons in custody. *Hamilton vs Chaffin*, 506 F.2d 904 (5th Cir. 1975). To lock someone up and deny him/her obviously needed medical attention is cruel and unusual punishment if it is done with "deliberate indifference" to the inmate's medical needs. *Estelle vs Gamble*, 429 US 97 (1976); *Reeves vs City of Jackson*, 608 F 2d 644 (5th Cir. 1979).

VIII. Conclusion

In order to reduce the risk of liability of officers and their supervisors and employers, facility administrators should implement effective screening measures to identify high risk inmates. They must additionally implement procedures and conditions of confinement that will protect those inmates from themselves once they have been identified as high risk. Furthermore, they must establish clear and effective liaison with appropriate mental health care providers. Such personnel can assist in developing appropriate training for police and corrections personnel. Line supervisors and officers, in turn, must follow these procedures very carefully. Last, and certainly not least, all personnel must develop an understanding of the nature of the duty of care that the law imposes in the custodial situation. Such an understanding leads to the automatic application of informed common sense in foreseeing and reducing risk.

It is hoped that the forgoing discussion of the general climate of liability exposure in the area of dealing with arrestees, detainees and prisoners who may be suicidal will assist officers in learning to recognizing where the risks are and to conduct

themselves in a manner that minimizes those risks. The point to remember is that prisoners frequently present a **foreseeable** risk of suicide and self injury at both police lockups and correctional facilities.