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Civil Liability for Prisoner Assault by Inmates

An area that has given rise to a significant number of lawsuits against correctional institutions and employees is that of alleged failure to adequately protect prisoners from assaults by each other. Correctional facilities are, of course, places with many persons prone to violence. It would probably be impossible to prevent all prisoner assaults on other inmates. Correctional facilities and employees, therefore, cannot ensure that no such violence will take place. What kind of measures does the law require, and when will there be civil liability for failure to apply them?

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1. An Important Supreme Court Decision

The current legal standard for federal civil rights liability against correctional officials and employees in the context of failure to prevent prisoner on prisoner assault was established by the U.S. Supreme Court in [Farmer v. Brennan](#), No. 92-7247, 511 U.S. 825 (1994). In that case, a preoperative transsexual with feminine characteristics was confined with other males in federal prisons, and was sometimes placed in the general prison population, but more often in segregation. The prisoner claimed to have been beaten and raped by another prisoner after a transfer from a correctional institution to a penitentiary and placement in the general population.

While previous court cases had established that it takes "deliberate

indifference" to a substantial risk of serious harm to an inmate to violate the Eighth Amendment's prohibition on cruel and unusual punishment, see [Helling v. McKinney](#), 91-1958, 509 U.S. 25 (1993), [Wilson v. Seiter](#), 89-7376, 501 U.S. 294 (1991), and [Estelle v. Gamble](#), No. 75-929, 429 U.S. 97 (1976), Farmer makes it clear that deliberate indifference in the sense meant is based on subjective awareness—i.e., that the prison official knows that an inmate or inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it or prevent it.

Such deliberate indifference is more than negligence, but can be less than acts or omissions "for the very purpose" of causing harm or with knowledge that harm will result, and is the equivalent of acting recklessly. Such recklessness, however, for liability, must be "subjective recklessness," as used in criminal law. The Eighth Amendment, the Court commented, outlaws cruel and unusual "punishments," not "conditions," and the failure to remedy a significant risk that a prison official or employee should have perceived but did not, while not praiseworthy, cannot be called the infliction of punishment.

2. Deliberate Indifference

Deliberate indifference, under most circumstances, means exactly what it says—some correctional employee or official, in order to be held liable, must have specific knowledge of a risk of serious harm to a prisoner, and knowingly fail to take action to attempt to prevent it.

This would also cover, of course, instances in which the prisoner claims that a correctional officer deliberately took steps to either facilitate or encourage the assault. In [Pinkston v. Madry](#), No. 03-2973, 440 F.3d 879 (7th Cir. 2006), for instance, the prisoner claimed that there was animosity between him and a corrections officer. He further claimed that this officer spoke to him, with an inmate in an adjacent cell within earshot, indicating that he was going to unlock the doors of the two inmates' cells so that he and the other inmate could "fight it out," knowing that there had been a dispute between them.

The officer then walked away, after which the doors to the cells allegedly opened. The two inmates allegedly engaged in a fistfight, with the plaintiff prisoner receiving a punch in the face, which injured his lip and drew blood. The prisoner claimed that this officer and another officer watched the fight from a control room.

Were these allegations true, there might have been liability. In this case, however, the court found that the prisoner failed to establish that either correctional officer failed to protect him from a situation in which there was a

"strong likelihood" that violence would occur. Evidence concerning the locking mechanism for the cells established that two officers are required to operate them, and that there was no evidence that there was another officer at the time in a position to assist in doing so. In other words, ultimately, the court did not believe the prisoners' story.

The mere fact, standing alone, that a prisoner expresses a desire not to be housed with certain prisoners, or certain types of prisoners, will not be enough to impose liability for a subsequent attack on the prisoner when correctional employees fail to move him. In [Lindell v. Houser](#), No. 04-2020, 442 F.3d 1033 (7th Cir. 2006), the court rules that correctional officials and employees did not act with deliberate indifference in placing a white supremacist prisoner in two cells with black cellmates who were members of a prison gang that he had a dispute with. There was no liability for two subsequent attacks on him by cellmates when his expressed reason for requesting a transfer was his desire not to be housed with blacks, a request he had no right to have granted.

Additionally, the prisoner had actually been given an option of either going to the cell he was assigned to, with a black inmate, or else returning to segregation, where he would be housed alone, and he chose to go to the assigned cell, just prior to one of the attacks.

Prisoners, the appeals court noted, do not have a right to be celled with an inmate of a particular race or even one with whom they "get along." There was no evidence that the specific cellmates had threatened the plaintiff prisoner before the attack or that the plaintiff prisoner had made the particular officers who directed him to his cells aware of his alleged past disputes with the Gangster Disciples gang.

Further, even if an officer were informed of the prisoner's fear of that gang, "prison guards are not required to believe every profession of fear by an inmate."

As for the second attack, there was approximately 18 months since the prior alleged attack by a member of the gang, which was too remote to show a risk of immediate harm, the court commented. Further, as to the first attack, the prisoner himself had not informed anyone of a dispute with the gang, but merely expressed a desire to be moved for racial or cultural conflict reasons.

On the other hand, in [Pierson v. Hartley](#), No. 02-3491, 391 F.3d 898 (7th Cir. 2004), despite the lack of a specific threat toward the particular inmate who was attacked, the court found that placing prisoner with a known violent history in an "open-spaced" dormitory, and allowing him to remain there after a conviction for possessing a weapon while incarcerated was sufficient to uphold a jury's award of

damages against responsible prison employees when the prisoner brutally attacked another prisoner, crushing his left testicle. The federal appeals court reinstated a jury award of \$100,000 in damages.

The deliberate indifference came in placing a known violent predator in an "unrestricted" dormitory. The appeals court found that there was sufficient evidence to find that the two defendants found liable knew that the assailant posed a substantial risk to the other inmates, and had been identified as an escape and assault risk, as well as having been convicted of possession of weapons in the prison—yet they failed to remove him, even after the weapons conviction. The plaintiff was not required to show that the assailant was known to pose a particular risk of harm to him—it was sufficient that he posed a risk to all of the other inmates in the dormitory. Inaction in the face of such a substantial risk, the court concluded, was sufficient to demonstrate deliberate indifference under the Eighth Amendment.

In [Brown v. Budz](#), No. 03-1997, 398 F.3d 904 (7th Cir. 2005), a white detainee's assertions that prison guards improperly failed to protect him against an assault by a black prisoner with a known propensity for attacking whites by allowing him unsupervised access to a dayroom occupied by him were sufficient to state federal civil rights claims. The appeals court found that the trial court improperly dismissed detainee's lawsuit. While the black prisoner had not made known threats against this specific white prisoner, the fact that he was known to attack white prisoners in general created a factual issue as to whether the guards' actions constituted deliberate indifference.

Similarly, in [Nei v. Dooley](#), #03-3261, 372 F.3d 1003 (8th Cir. 2004), the claim of deliberate indifference was not based on specific threats to particular prisoners. Rather, the court ruled that the prison warden and other officials were not entitled to qualified immunity in a lawsuit by three prisoners claiming that they exhibited deliberate indifference to attacks on them and other actions by HIV-positive prisoner who threatened to "infect them," urinated on the floor and placed fecal matter there when assigned to "clean" the restrooms. If, as the plaintiff prisoners alleged, the defendants knew of this pattern of behavior by the HIV-positive prisoner and failed to take remedial action, that could constitute actionable deliberate indifference.

When there are known threats by one prisoner against another, of course, or other known facts which give risk to knowledge that one specific prisoner is likely to attack another, failure to act can be viewed as deliberate indifference. In [Rangolan v. County of Nassau](#), #03-7367, 370 F.3d 239 (2nd Cir. 2004), the court found that the plaintiff prisoner was properly awarded \$820,000 in damages against county for failure to protect him from physical assault by another inmate

who he had helped imprison by cooperating in a narcotics investigation.

Liability in prisoner assault cases can lead to significant damage awards when injuries are serious. In [Britt v. Garcia](#), No. 05-0641, 457 F.3d 264 (2nd Cir. 2006), the court ruled that the New York Commissioner of Corrections and deputy prison superintendent were not entitled to qualified immunity on prisoner's claim that they conspired to violate his civil rights in a lawsuit by failing to protect him from multiple attacks by other prisoners. The plaintiff prisoner had been slashed by another inmate on his head, neck, and back. While he was purportedly placed in "protective custody" after returning to the prison following receiving medical attention, he was still allegedly attacked at least once more by another inmate, and subsequently, in yet another incident, his prison cell was set on fire by an unknown person or persons. The jury awarded a total of \$150,000 in compensatory damages and \$7.5 million in punitive damages, but a new trial was ordered on the punitive damages issue.

In the context of actions taken once an attack has actually occurred, courts understand that officers often have to act quickly to control the situation, and cannot anticipate each thing that happens in volatile circumstances. In [Fisher v. Lovejoy](#), No. 04-3776, 414 F.3d 659 (7th Cir. 2005), the court ruled that a correctional officer who required detainee to stand against the wall near hostile inmates after he had been stabbed did not act unreasonably or with deliberate indifference, and was not liable for the subsequent additional stabbing of the detainee.

At the same time, when correctional employees know that an attack is plainly about to happen, or are somehow made aware of an imminent possibility of one, they cannot simply fail to investigate and thereby claim, as a defense, that they did not have specific knowledge of the threat. In [Velez v. Johnson](#), No. 04-1943, 395 F.3d 732 (7th Cir. 2005), a deputy who allegedly failed to go investigate after prisoner pushed an "emergency" button in his cell was not entitled to qualified immunity in the prisoner's lawsuit claiming that this inaction allowed his cellmate, then holding a razor to his neck, to proceed with a physical assault and anal rape. Similarly, in [Odom v. South Carolina Dept. of Corrections](#), #02-7086, 349 F.3d 765 (4th Cir. 2003), the court ruled that correctional officers' alleged failure to remove prisoner from area where fellow inmates were attempting to gain access to him to assault him, if true, constituted deliberate indifference to his safety, so that officers were not entitled to qualified immunity.

3. Can institutional conditions themselves give rise to liability?

What about general institutional conditions such as overcrowding? Can they themselves give rise to liability for failure to take adequate steps to prevent a

particular prisoner-on-prisoner assault? In [Crow v. Montgomery](#), No. 03-3859, 403 F.3d 598 (8th Cir. 2005), a federal appeals court said no, finding that jail officers were entitled to qualified immunity in a lawsuit claiming that they failed to protect a prisoner from assault by other inmates, in the absence of any allegation that they disregarded any known risk of harm. The court ruled that general allegations that the facility was overcrowded were insufficient to show deliberate indifference and, at most, indicated negligence, which could not be the basis for a constitutional claim.

Similarly, in [Purcell v. Toombs County](#), No. 02-11994, 400 F.3d 1313 (11th Cir. 2005), the court ruled that conditions at a Georgia county jail failed to create a substantial risk of serious harm necessary to show a violation of constitutional rights in the failure to protect a prisoner from attack by other inmates who thought he had taken money from one of them. Allowing inmates to possess money for commissary purchases, the court commented, while perhaps not the "best practice," was not a violation of the constitution.

4. Specific knowledge of particular threats

There are numerous instances in which one prisoner attacks another, and, with the aid of hindsight, it may be clear to one and all that the two prisoners should never have been placed together in any situation if avoidable. "Deliberate indifference," however, is not based on hindsight, but on what the defendant correctional employee or official knew at the time of the incident at issue.

In [Whiting v. Marathon County Sheriff's Department](#), No. 03-3515, 382 F.3d 700 (7th Cir. 2004), for instance, jail personnel were found not liable for placing a pregnant female detainee in a visiting room with a male prisoner and his attorney when they had no knowledge of a prior no-contact court order or the male prisoner's prior alleged conspiracy to murder her. Had they had such knowledge, putting the two together in the visiting room may well have led to liability.

Further, the fact that one correctional official or employee has knowledge of the specific threat of harm that an inmate poses to a specific prisoner is insufficient to impose liability for an assault on an official or employee without such personal knowledge. In [Fender v. Bull](#), No. 04-3898, 437 F.3d 770 (8th Cir. 2006), a Nebraska correctional officer was not liable for failure to prevent attack on prisoner in his cell when he had no knowledge that the prisoner had been transferred to the facility to avoid retaliation against him by a motorcycle gang for having exposed their plot to kill a correctional officer in Virginia.

When not even the prisoner themselves previously believed that he was in danger from another specific prisoner, it is difficult to find that correctional

officers should have anticipated an attack and taken steps to prevent it. [In Berry v. Sherman](#), No. 03-2828, 365 F.3d 631 (8th Cir. 2004), the court found that correctional officers were entitled to qualified immunity for failing to protect a prisoner from an attack by his cellmate when there was no evidence that anyone, including the plaintiff himself, believed that he was in danger from the cellmate until the attack actually occurred.

Knowledge of one specific threat to a particular prisoner does not impose on correctional employees some sort of strict liability for failure to prevent any and all attacks by anyone. In [Riccardo v. Rausch](#), #02-1961, 359 F.3d 510 (7th Cir. 2004), a lieutenant who assigned a prisoner a new cellmate who subsequently sexually assaulted him was not liable, despite prisoner's claim that he feared an assault from a Latin Kings gang member. There was no showing that the sexual assault had anything to do with this gang, and there was no evidence from which the lieutenant could be said to be aware of a substantial risk of harm from pairing these two prisoners together.

Prisoners who themselves engage in fights or assaults on other prisoners will have a difficult time convincing courts that they should recover from prison officials for the injuries they receive from the other prisoners in the course of doing so. In [Encarnacion v. Dann](#), #02-0312, 80 Fed. Appx. 140 (2nd Cir. 2003), the court found that a prisoner could not succeed in suing correctional officials for allegedly failing to protect him from assault by another inmate who he was convicted of murdering. Any injuries the plaintiff prisoner suffered, including his conviction and subsequent placement in solitary confinement, the court commented, were the result of his "affirmative act of murder," rather than any failure on the part of the defendants.

If knowledge of a specific and credible threat can be proven, some action must be taken to attempt to prevent it. See [Hearns v. Terhune](#), No. 02-56302, 413 F.3d 1036 (9th Cir. 2005) (Muslim prisoner adequately alleged that prison officials knew of a threat to him from other Muslim inmates, but failed to take action to protect him), [Conley v. Very](#), No. 05-2650, 450 F.3d 786 (8th Cir. 2006) (new trial ordered in lawsuit by prisoner claiming that housing unit manager improperly denied his request for protective custody after his cellmate allegedly raped him, resulting in multiple subsequent rapes).

Sometimes, the remedial or preventive action taken by prison employees may not be the one that the plaintiff prisoner wanted, or may, in fact, fail to prevent an attack. But if the employees are truly attempting to take action to prevent such problems, their actions do not constitute deliberate indifference. In [Borello v. Allison](#), No. 05-3515 446 F.3d 742 (7th Cir. 2006), a federal appeals court found that prison employees did not act with deliberate indifference by failing to remove

a prisoner's cellmate, who he complained was "nuts" and had tried to assault him. They promptly had the cellmate evaluated by a psychiatrist and took other steps to assess the situation, and were therefore not liable for the cellmate's subsequent attack on the prisoner approximately a week later.

5. Supervisory liability

Supervisory employees may be held liable for prisoner on prisoner attacks either on the basis of their personal knowledge of a specific risk of harm to a particular prisoner, or on the basis of their role in establishing a policy that arguably causes an assault to occur.

In [Greene v. Bowles](#), No. 02-3626, 361 F.3d 290 (6th Cir. 2004), a federal appeals court reinstated a claim against prison warden for alleged failure to protect transsexual inmate from an attack by a maximum-security prisoner. The plaintiff prisoner raised a sufficient factual issue as to whether the warden had knowledge of the possible risk to her safety because of her vulnerability and her attacker's status as a "predator," but failed to act to protect her, the court found.

In [Bougere v. County of Los Angeles](#), No. B183930, 2006 Cal. App. Lexis 1065, 141 Cal. App. 4th 237 (Cal. 2d App. Dist. 2006), the Los Angeles County Sheriff, in establishing policies concerning the assignment of detainees at the jail was found to be carrying out state law enforcement functions rather than acting as a county policymaker, and the county therefore could not be held liable for injuries a detainee allegedly suffered because he was placed in close proximity to other prisoners who threatened and assaulted him. The sheriff was entitled to Eleventh Amendment immunity under these circumstances.

6. Liability for negligence

The cases cited above in this article focus on liability under federal civil rights law. It is worth noting, however, that state law in some jurisdictions may give rise to liability for negligent acts, a much lesser standard than deliberate indifference, which arguably result in or contribute to a prisoner-on-prisoner assault.

Negligent acts can result in liability for the U.S. government under some circumstances, pursuant to the Federal Tort Claims Act, 28 U.S.C. Secs. 2671-2680. In [Montez v. U.S.](#), No. 02-6303, 359 F.3d 392 (6th Cir. 2004), however, the court found that federal prison officials were not liable for the death of a prisoner beaten to death by two fellow inmates with a fire extinguisher. Their decisions regarding where to house the prisoner and how to protect his safety fell within the "discretionary function" exception to the Federal Tort Claims Act, as those decisions were discretionary and "grounded in policy," since there was no

mandatory course of conduct for officials to follow.

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