NEITHER CRUEL NOR UNUSUAL: 
AN HOUR AND A HALF DELAY IN TREATMENT 
CAN NOW AMOUNT TO DELIBERATE 
INDIFFERENCE

MONICA J. RAVEN


INTRODUCTION

United States penitentiaries housed 2,173,800 inmates in 2015.¹ According to the 2010 United States Census, correctional facilities, as a whole, are more populous than fourteen states.² The prison population suffers from higher rates of mental illness, chronic medical conditions, and infectious diseases compared to the general United

---

States population. In fact, more than eight in ten inmates, in both state and federal prison, receive medical care while incarcerated.

A constitutional violation may arise out of the Eighth Amendment if a prisoner’s medical treatment, or lack thereof, is found to constitute “cruel and unusual punishment.” Claims of deficient medical care do not always rise to the level of an Eighth Amendment violation. Negligence in diagnosis or medical treatment, typically addressed in medical malpractice or medical negligence actions, does not become a constitutional violation merely because the victim is a prisoner.

In *Estelle v. Gamble*, the Supreme Court of the United States established the “deliberate indifference” standard to analyze whether the acts or omissions in a prisoner’s medical treatment violate the Eighth Amendment. A claim of deliberate indifference contains an objective as well as a subjective component. To establish the objective component, a court must find that the plaintiff-prisoner suffered from an objectively serious medical condition. The subjective component requires the court to analyze whether the defendants knew of and disregarded a substantial risk to the prisoner’s health. To establish this second component, the defendant must, first, have been aware of the facts from which he could infer the existence of a substantial risk of serious harm, and, second, have actually drawn the inference.

---

6 *Estelle*, 429 U.S. at 97.
7 *Id.*
8 *Id.*
9 Lewis v. McLean, 864 F.3d 556, 563 (7th Cir. 2017).
11 *Id.*
12 *Id.* at 837.
Recently, the United States Court of Appeals for the Seventh Circuit was tasked with applying the deliberated indifference standard. In *Lewis v McLean, et al.*, James Lewis, a prisoner, alleged that Lieutenant Joseph Cichanowicz and Nurse Angela McLean, amongst other defendants, were deliberately indifferent by delaying his access to medical care. On the other hand, Cichanowicz and McLean argued that they were unable to provide care to Lewis because McLean was not following their commands. The Seventh Circuit vacated the district court’s grant of summary judgment on the deliberate indifference claim against Cichanowicz and McLean. The majority reasoned that a reasonable jury could find that Cichanowicz and McLean exhibited deliberate indifference in delaying Lewis’s treatment, causing Lewis unnecessary suffering. The concurrence illustrated that the deliberate indifference standard used by courts is merely tangential to the Eighth Amendment of the Constitution.

This article will analyze the strength of the Seventh Circuit’s decision in light of precedent and public policy. Part I contains the legal standards applicable to claims of deliberate indifference brought under 42 U.S.C. § 1983, and the legal distinctions between such claims and state law medical malpractice claims. Part II discusses the factual and procedural background of *Lewis v. McLean, et al.* Part III argues that the Seventh Circuit incorrectly decided *Lewis v. McLean, et al.* on precedential and public policy grounds. It further argues that the courts should return to following the text of the Constitution and apply the cruel and unusual punishment standard.

**BACKGROUND AND STANDARDS**

The Supreme Court established the government has a duty to provide medical care for those it is punishing by way of

---

13 *Lewis*, 864 F.3d at 560.
14 *Id.* at 564.
15 *Id.* at 566.
16 *Id.* at 563–64.
17 *Id.* at 566 (Manion, J., concurring).
incarceration. 42 U.S.C. § 1983 provides a cause of action for prisoners subjected to cruel and unusual punishment in violation of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment.

A. History of Eighth Amendment’s Proscription of Cruel and Unusual Punishment

The drafters of the United States Constitution took the language of the Eighth Amendment from the English Bill of Rights of 1689. Like the English, the primary concern of the drafters of the Eighth Amendment was to prevent torture and other barbarous methods of punishment. Use of the Eighth Amendment was limited through the nineteenth century. During this time, the courts declined arguments to extend the protections of the Eighth Amendment to include punishments disproportionate to the crime.

In 1910, the Supreme Court modified its approach in analyzing the cruel and unusual protection clause of the Eighth Amendment. In Weems v. United States, the Court extended Eighth Amendment protections to excessive punishment, no longer limiting its protections strictly to torture and barbarous acts. The Court stated: “a principle to be vital must be capable of wider application than the mischief

20 Stuart Klein, Prisoners’ Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment’s Cruel and Unusual Punishment Clause, 7 FORDHAM URBAN L.J. 1, 2 (1978). The English Bill of Rights of 1689 provided that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Id.
21 Estelle, 429 U.S. at 102; Klein, supra note 20, at 3.
22 Estelle, 429 U.S. at 102; Klein, supra note 20, at 3.
23 Estelle, 429 U.S. at 102; Klein, supra note 20, at 3.
which gave it birth.”  

Hence, the Court adopted the view that the Eighth Amendment was to continually evolve with changing societal views of prison conditions and humane justice. Decades later, the Supreme Court returned to the cruel and unusual punishment clause analysis. In Trop v. Dulles, the Court reinforced that the Eighth Amendment must draw its meaning from “evolving standards of decency.”

Post Trop, courts began analyzing the constitutionality of treatment in prisons against this backdrop of “evolving standards of decency.” The relative vagueness of this guideline created pressure to analyze claims of cruel and unusual punishment under new standards. This led courts to apply many different judicial tests to inadequate medical care claims, such as “abuse of discretion,” “deprivation of basic elements of adequate medical treatment,” and “deliberate indifference.”

The Supreme Court, in Estelle v. Gamble, resolved the lower court confusion by adopting the standard of “deliberate indifference.” In Estelle, inmate J.W. Gamble was injured when a bale of cotton fell on him while performing prison work. He continued to work for four hours until he became stiff. Gamble was granted a pass to the unit hospital and was seen by a physician. The prison physician prescribed a pain reliever, a muscle relaxant, in-cell meals, and

---

26 Id. at 373; Klein, supra note 20, at 4.
27 Boyer, supra note 24; Klein, supra note 20, at 5.
28 Boyer, supra note 24.
30 Klein, supra note 20, at 6.
31 Id. at 7.
32 See Flint v. Wainwright, 433 F.2d 961 (5th Cir. 1970); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972); Klein, supra note 20, at 7.
34 See id. at 99.
35 See id.
36 Id.
allowed Gamble to remain in his cell except for showers. Despite the measures taken by the physician, Gamble continued to complain of pain. Gamble was seen by prison medical professionals seventeen times within a three-month period.

The District Court dismissed Gamble’s complaint for failure to state a claim upon which relief could be granted. The Court of Appeals reversed and remanded with instructions to reinstate the complaint. The Supreme Court granted certiorari.

In its decision, the Estelle Court rejected the Fourth Circuit’s application of the broader standard of “reasonable care.” Rather, the Court held that “in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” A medical need is “serious,” satisfying the Estelle test, if it is “one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.” It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.” The Court reiterated that prison personnel are required to provide medical care for a prisoner “who cannot, by reason of the deprivation of his liberty, care for himself.” The Court reversed, finding that while deliberate indifference to a prisoner’s serious medical condition constitutes cruel

37 Id.
38 Id. at 99-101.
39 Id. at 107.
40 Id. at 98.
41 Id.
42 Id.
43 Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969); Klein, supra note 20 at 15.
44 Estelle, 429 U.S. at 106.
46 Estelle, 429 U.S. at 106.
47 Id. at 104.
and unusual punishment in violation of the Eighth Amendment, Gamble’s complaint was insufficient to state a cause of action.\textsuperscript{48}

Despite the Court’s attempt to clarify in \textit{Estelle},\textsuperscript{49} lower courts inconsistently interpreted and applied the deliberate indifference test.\textsuperscript{50} This resulted in different analyses of claims brought under 42 U.S.C. §1983.\textsuperscript{51} The Court revisited the deliberate indifference standard in \textit{Farmer v. Brennan} and further clarified its meaning.\textsuperscript{52}

In \textit{Farmer}, Dee Farmer a transsexual inmate filed a Bivens\textsuperscript{53} action alleging that the prison officials acted with deliberate indifference to the substantial risk of physical abuse and sexual abuse he\textsuperscript{54} suffered while in the penitentiary.\textsuperscript{55} Although \textit{Farmer} did not involve treatment by a medical professional, the Court applied the same analysis.\textsuperscript{56} Evaluating whether Farmer’s claim was a violation of the Eighth Amendment, the Court maintained that a violation of the cruel and unusual punishment provision occurs when a two-prong test\textsuperscript{57} has been satisfied.\textsuperscript{58} Following \textit{Wilson v. Seither}, a constitutional

\textsuperscript{48} Id. at 98.
\textsuperscript{49} See id. at 97.
\textsuperscript{51} Id.
\textsuperscript{53} Civil rights cases against the federal government and its agents are brought pursuant to the Eighth Amendment, knowns as “Bivens actions.” See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).
\textsuperscript{54} Farmer is a pre-operative transsexual, biologically born a male. Farmer took several medical steps to transition to a female but ultimately did not complete sex reassignment. To avoid confusion, pronouns referencing Farmer correspond with those used by the Court.
\textsuperscript{55} Farmer, 511 U.S. at 829.
\textsuperscript{57} The Supreme Court in \textit{Wilson v. Seiter}, 501 U.S. 294, 297 (1991), held that claims of inadequate medical treatment only implicate the Eighth Amendment if the
violation occurs when the alleged deprivation is objectively and sufficiently serious, and the prison official acted with deliberate indifference to inmate health or safety. Expanding on the second requirement, the Court stated that “a prison official must have a ‘sufficiently culpable state of mind’ to violate the Eighth Amendment’s cruel and unusual punishments clause.”

The Farmer Court clarified the meaning of deliberate indifference by comparing the criminal and civil definitions of recklessness. In the criminal context, criminal law requires that one is aware of harm and disregards that risk of harm. However, civil law only requires that one knew or should have known of an unjustifiably high risk of harm. The Court adopted the criminal law standard “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 Court expanded that 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.” The Court noted, however, that an official who actually knew of a substantial risk to inmate health or safety may be found free from liability if the official responded reasonably to the risk, even if the harm was not ultimately averted. Applying this standard, the Farmer Court held

alleged deprivation is “sufficiently serious” and the deprivation was an “unnecessary and wanton infliction of pain.”

58 Farmer, 511 U.S. at 834.
59 Id. at 834 (citing Wilson, 501 U.S. at 297).
60 Id.
61 Id. (citing Wilson, 501 U.S. at 297).
62 Id. at 837.
63 Id. at 837-38.
64 Id. at 837.
65 Id.
66 Id.
67 Id. at 844.
that prison officials did not violate the Eighth Amendment.\textsuperscript{68} The Court instructed that a prison official’s duty under the Eighth Amendment deliberate indifference standard is to ensure “reasonable safety” to inmates,\textsuperscript{69} and that the occurrence of an injury by a prisoner at the hands of a prison official does not automatically translate to a constitutional violation.\textsuperscript{70}

**B. 42 U.S.C. § 1983 and Medical Malpractice**

There are two avenues under which medical professionals treating prisoners are vulnerable to lawsuits: Eighth Amendment claims brought under 42 U.S.C. §1983\textsuperscript{71} and state law medical malpractice actions. The Estelle Court explicitly stated that a prisoner’s claim of inadequate medical care does not always constitute an Eighth Amendment claim.\textsuperscript{72} Moreover, medical malpractice claims alleging negligent treatment or diagnosis of a medical condition do not transform into an Eighth Amendment claim merely because the patient is a prisoner.\textsuperscript{73} Although the facts surrounding the claims may be

\begin{itemize}
  \item\textsuperscript{68} Id. at 825.
  \item\textsuperscript{69} Id. at 844.
  \item\textsuperscript{70} Id. at 834.
  \item\textsuperscript{71} 42 U.S.C. §1983. This section provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.” Id.
  \item\textsuperscript{72} Estelle v. Gamble, 429 U.S. 97, 105 (1976).
  \item\textsuperscript{73} Id. at 106.
\end{itemize}
identical, state medical malpractice claims and Eight Amendment claims are more different than similar.74

A primary difference between these two claims is the standard which the plaintiff must prove. In a medical malpractice claim, the plaintiff must prove that the medical care provider deviated from the standard of care and that the deviation proximately caused the plaintiff’s injury.75 In contrast, under 42 U.S.C. §1983 a plaintiff must prove a “deliberate indifference.”76

A second distinction between the two claims lies in the use of expert witnesses and expert testimony. In state medical malpractice actions, experts are a barrier to entry for many state actions77 and virtually a necessity in the pleading stages. While retaining an expert is not necessarily difficult, it is expensive.78 This expense generally prevents most inmates from retaining an expert.79 If the inmate cannot retain an expert, then the inmate cannot file a state law medical malpractice claim.80 Conversely, Eighth Amendment claims do not require the support of an expert; a plaintiff need only file a suit.81


75 Steven E. Pegalis, Expert Testimony, AM. LAW MED. MALP. §8:1 (June 2017).

76 See supra notes 139-150 and accompanying text for the history and nuances of the deliberate indifference standard.

77 See e.g., Chapman, supra note 74 (“In most states before the plaintiff can file a medical malpractice claim he/she must obtain a written opinion from a physician or other health care professional licensed in the same specialty.”).

78 See e.g., Chapman, supra note 74.

79 See e.g., id.

80 See e.g., id.

A final distinction is that most states impose a cap on damages and prohibit punitive damages on medical malpractice claims, whereas Eighth Amendment claims have no such cap or limitation. A successful Eighth Amendment suit entitles the plaintiff to recover attorneys’ fees in addition to compensatory damages.

**LEWIS V. MCLEAN, ET AL.**

**A. The Facts**

James Lewis was incarcerated at Wisconsin State Secure Program Facility when, on February 8, 2014, he woke up at approximately 5:15 a.m. and attempted to get out of bed. Upon his attempt, he experienced sharp pain from the base of his neck to his tailbone. Due to the pain, Lewis could neither lie back down nor stand up. He remained unable to move until 5:39 a.m. when he leaned forward and pressed the emergency call button on the wall of his cell. As Lewis was housed in segregation, the guard who answered the call looked at the live video footage from the security camera in Lewis’s cell and

---

82 Notably, Wisconsin, the state where James Lewis presides as a prisoner, had a $750,000 limitation on noneconomic medical malpractice damages when Lewis filed his case. Wis. Stat. Ann. § 893.55 (2008). However, on July 5, 2017, the Court of Appeals of Wisconsin held that the statutory cap on noneconomic damages was unconstitutional. Mayo v. Wisconsin Injured Patients & Families Comp. Fund, 2017 WI App 52, ¶ 1. The court reasoned that the statutory cap was unconstitutional on its face because it violated the principles the Wisconsin Supreme Court articulated in Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, “by imposing an unfair and illogical burden only on catastrophically injured patients, thus denying them the equal protection of the laws.” Id.

83 Chapman, supra note 74.


85 Lewis v. McLean, 864 F.3d 556, 558 (7th Cir. 2017).

86 Id.

87 Id.

88 Id. at 559.
saw him sitting on the bed.\textsuperscript{89} The guard then inquired what the emergency was; Lewis replied that he was suffering from extreme pain in his back and was unable to move.\textsuperscript{90} The guard relayed this information to Lieutenant Joseph Cichanowicz, a security supervisor.\textsuperscript{91}

At some time thereafter, Cichanowicz went to Lewis’s cell where Lewis explained that he was experiencing terrible pain and could not stand up or lie down.\textsuperscript{92} After ten or fifteen minutes had passed and no nurse had arrived, Lewis pushed the emergency call button again and requested medical assistance.\textsuperscript{93} At approximately 6:05 a.m., Cichanowicz returned to Lewis’s cell with Nurse Angela McLean.\textsuperscript{94} Lewis reported to McLean that he was experiencing “terrible pain in his back” and “couldn’t move.”\textsuperscript{95} Wisconsin State Secure Program Facility’s policy discourages staff from examining an inmate in his cell.\textsuperscript{96} Therefore, following the policy, McLean relayed to Lewis that guards would escort him to the infirmary after the headcount, which typically occurred at 6:15 a.m.\textsuperscript{97} McLean and Cichanowicz stated that Lewis would first have to stand with his back to his cell door so he could be handcuffed from behind through the slot in the door.\textsuperscript{98} Lewis contended that he was in terrible pain and he could not stand or move; he was only able to lean forward to press the call button.\textsuperscript{99} At this point Cichanowicz warned Lewis that if correctional officers had to be sent into the cell without first handcuffing Lewis, they would throw him on the ground and handcuff him from behind.\textsuperscript{100} Lewis reiterated

\begin{itemize}
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id.
\end{itemize}
he could not move.\textsuperscript{101} McLean maintained that if Lewis wanted help he needed to follow Cichanowicz’s orders; Cichanowicz and McLean then walked away.\textsuperscript{102}

After Cichanowicz and McLean left Lewis’s cell, Cichanowicz viewed the video footage of Lewis in his cell.\textsuperscript{103} Around 6:40 a.m., Cichanowicz told McLean that Lewis had not moved from a seated position on his bed since about 5:15 a.m.\textsuperscript{104} McLean did not take any actions.\textsuperscript{105} Less than an hour later, Sergeant Wayne Primmer heard from other staff that Lewis was complaining of pain and that he was unable to stand.\textsuperscript{106} Primmer viewed the live video footage from Lewis’s cell and saw him fall to the floor.\textsuperscript{107} Primmer then contacted Lieutenant Joni Shannon-Sharpe and briefed her about Cichanowicz’s earlier encounter with Lewis, Lewis’s continuing complaints of pain and inability to stand or walk, and Lewis was now lying on the floor.\textsuperscript{108}

At approximately 7:30 a.m., Shannon-Sharpe went to Lewis’s cell.\textsuperscript{109} Like Cichanowicz, Shannon-Sharpe informed Lewis that guards could not enter the cell to take him to the infirmary unless he was restrained.\textsuperscript{110} Lewis repeated that he could not reach the door because of the pain in his back and that being on the floor increased his pain.\textsuperscript{111} Shannon-Sharpe then spoke with McLean and directed her to contact the on-call physician, Dr. Meena Joseph.\textsuperscript{112}

\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 560.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
Soon thereafter, at 7:40 a.m., McLean telephoned Dr. Joseph. \(^{113}\) Dr. Joseph directed that Lewis be taken to a hospital. \(^{114}\) Subsequently, Shannon-Sharpe gathered five guards, two of which had medical training, to transport Lewis. \(^{115}\) The group entered Lewis’s cell at 7:58 a.m. \(^{116}\) After abandoning their effort to force Lewis to a standing position to search him, the group restrained him, placed him in a wheelchair, searched him with a handheld metal-detector, lifted him into a van, and drove him to a local hospital. \(^{117}\) Lewis was admitted to the emergency room at 8:53 a.m. \(^{118}\) In the emergency room, doctors gave Lewis morphine for his back pain and Ativan for his agitation. \(^{119}\) Lewis was diagnosed with myalgia \(^{120}\) and muscle spasms of the neck and upper back. \(^{121}\) An hour later, Lewis was able to stand and walk. \(^{122}\) Lewis was prescribed ibuprofen and a muscle relaxant, and was discharged from the hospital at 10:24 a.m. \(^{123}\)

**B. District Court Opinion**

In April 2014, Lewis filed a lawsuit under 42 U.S.C. § 1983 against Lieutenant Cichanowicz, Lieutenant Shannon-Sharpe, Nurse McLean, Dr. Joseph, and the five guards who removed him from his cell with the United States District Court for the Western District of Wisconsin. \(^{124}\) Lewis alleged that all of the named defendants showed

\(^{113}\) *Id.*  
\(^{114}\) *Id.*  
\(^{115}\) *Id.*  
\(^{116}\) *Id.*  
\(^{117}\) *Id.*  
\(^{118}\) *Id.*  
\(^{119}\) *Id.*  
\(^{120}\) The American Heritage Medical Dictionary defines myalgia as “[m]uscular pain or tenderness, especially when diffuse and nonspecific.”  
\(^{121}\) *Id.*  
\(^{122}\) *Id.*  
\(^{123}\) *Id.*  
\(^{124}\) *Id.*
deliberate indifference to his severe back pain by delaying his access to medical care. Lewis also argued that Shannon-Sharpe and the five guards were indifferent to his back pain because they restrained him and did not take him to the hospital on a stretcher. Further, Lewis claimed that Shannon-Sharpe and the five guards used excessive force when handcuffing and transporting him to the hospital. Lastly, Lewis asserted malpractice claims against Nurse McLean and Dr. Joseph.

Both parties filed cross-motions for summary judgment. Writing for the district court, Chief U.S. District Judge James Peterson granted summary judgment for the defendants. The district court reasoned that undisputed evidence established only a “modest amount of force” was used, and none of it was applied “maliciously or sadistically for the purpose of infliction of pain.” The district court further reasoned that even if Lewis’s back pain was a serious medical condition, a jury could not reasonably find from the evidence that “the defendants took longer than was necessary to assess [Lewis’s] medical issue and get him treatment” or that they “treated him unnecessarily roughly in restraining him.” Finally, the court relinquished supplemental jurisdiction over Lewis’s medical malpractice claim.

\[125\] Id.
\[126\] Id.
\[127\] Id.
\[128\] Id.
\[129\] Id. at 561.
\[130\] Id.
\[131\] Id.
\[132\] Id.
\[133\] Id.
C. Appeal to Seventh Circuit

The Court of Appeals for the Seventh Circuit reviewed the district court’s grant of summary judgment de novo,134 “viewing the facts in the light most favorable to Lewis.”135

The majority considered whether a reasonable jury could find that the defendants were deliberately indifferent to Lewis’s serious medical need.136 They vacated the district court’s grant of summary judgment on the deliberate indifference claim against Cichanowicz and McLean,137 concluding that “a jury reasonably could find that Cichanowicz and McLean exhibited deliberate indifference by delaying Lewis’s treatment for approximately one and a half hours—the time that passed between their learning of Lewis’s condition and Dr. Joseph’s directive prompting action—thus causing Lewis unnecessary suffering.”138

1. Judge Rovner’s Majority Opinion

Reviewing the record in the light most favorable to Lewis, the majority found that the disputed facts pertaining to Cichanowicz and McLean’s state of mind precluded a grant of summary judgment in their favor on Lewis’s claim of deliberate indifference to a serious medical need.139

Citing Farmer v. Brennan, Judge Ilana Rovner posited that in determining an Eighth Amendment violation alleged by a prisoner, the court performs a two-step analysis.140 First, the Court examines

---

134 While the Court of Appeals for the Seventh Circuit did not explicitly state it reviewed the case de novo, the court reviews grants of summary judgment de novo. See e.g., Whiting v. Wexford Health Sources, Inc., 839 F.3d 658, 661 (7th Cir. 2016).
135 Lewis, 864 F.3d at 565.
136 Id. at 558.
137 Id. at 566.
138 Id. at 563–64.
139 Id. at 565.
140 Id. 562-563.
whether the prisoner established an “objectively serious” medical condition.\textsuperscript{141} Second, the court determines whether the prison officials acted with a “sufficient state of mind,” specifically, that the officials “both knew of and disregarded an excessive risk to [an] inmate[s] health.”\textsuperscript{142}

In analyzing the first step, the court concluded that there was enough evidence to support a finding that Lewis’s muscle spasm and accompanying back pain was a serious medical condition.\textsuperscript{143} The court explained that a medical condition is significantly serious, as to fulfill the first step of the analysis, if an inmate has been diagnosed by a medical professional as needing treatment or is obvious in nature that a lay person would perceive the need for a physician’s attention.\textsuperscript{144} Further, the court suggested that a medical condition need not be life threatening to be deemed serious.\textsuperscript{145} Rather, it could be a condition that, if not treated, would result in significant injury or unnecessary and wanton infliction of pain.\textsuperscript{146}

Turning to the second step, the majority first acknowledged that a jury could not reasonably find that Lieutenant Shannon-Sharpe, Dr. Joseph, and the guards who transported Lewis were deliberately indifferent in either assessing Lewis’s medical condition or in restraining and transporting him.\textsuperscript{147} The court commented that Lewis wisely limited his deliberate indifference claim to McLean and Cichanowicz, discussing the remaining defendants limitedly.\textsuperscript{148}

Accordingly, the Court then focused on the deliberate indifference claim specifically against Cichanowicz and McLean.\textsuperscript{149} Quoting Perez v. Fengolio, the majority maintained that “[a] delay in treatment may

\begin{flushend}
\footnotesize
\textsuperscript{141} Id. at 563.  \\
\textsuperscript{142} Id.  \\
\textsuperscript{143} Id.  \\
\textsuperscript{144} Id.  \\
\textsuperscript{145} Id.  \\
\textsuperscript{146} Id.  \\
\textsuperscript{147} Id.  \\
\textsuperscript{148} Id.  \\
\textsuperscript{149} Id. 
\end{flushend}
show deliberate indifference if it exacerbated the inmate's injury or unnecessarily prolonged his pain,” and “even brief, unexplained delays in treatment may constitute deliberate indifference.” Judge Rovner took issue that Cichanowicz and McLean had not provided an explanation for their inaction, and, instead, blamed Lewis for the delay. Judge Rovner noted that Cichanowicz and McLean argued that they were entitled not to act because Lewis failed to comply with their orders. Thus, they were asking the court to construe the evidence against Lewis, rather than in his favor. Judge Rovner posited that, in effect, Cichanowicz and McLean requested to flip the standard for a review of summary judgment.

Judge Rovner stated that, construed in the light most favorable to Lewis, the evidence at summary judgement showed that Lewis experienced back pain from 5:15 a.m. until he received an injection of morphine—approximately four hours later. Further, that Lewis’s back pain was severe, and that Lewis begged Cichanowicz and McLean for help after they told him he would not receive treatment until he was restrained. The court also noted that Cichanowicz did nothing to help Lewis. Likewise, McLean did not help Lewis until Shannon-Sharpe’s involvement promoted McLean to call Dr. Joseph. Judge Rovner contended that it was unclear if McLean and Cichanowicz would have assisted Lewis at all had Sergeant Primmer not reported his observations to Shannon-Sharpe.

150 Id.
151 Id. at 564.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id.
157 Id.
158 Id. at 565.
2. Judge Manion’s Concurrence

Judge Daniel Manion began his concurrence by asserting that the Court’s opinion correctly applied controlling precedent, and he joined the opinion in full. Judge Manion argued that a reasonable juror could conclude from the record that Cichanowicz and McLean delayed Lewis’s treatment by more than an hour when they knew that Lewis was in severe pain. Specifically, Judge Manion purported that said juror could infer deliberate indifference because both Cichanowicz and McLean were aware from the video footage that Lewis had not moved since 5:15 a.m., nonetheless, did not take action to move the process along. Judge Manion reiterated that under controlling precedent, that would constitute deliberate indifference.

Judge Manion contended that he wrote separately to make two points. In his first point, Judge Manion stated that he did not read the Court’s opinion as being contingent on the length of the delay that Cichanowicz and McLean created. Judge Manion posited that the facts of this case, particularly that Cichanowicz and McLean confirm that Lewis was suffering in severe pain via the video footage, permit Lewis to survive summary judgment. Judge Manion acknowledged that under another set of facts an hour delay of treatment for a similar condition may not be enough to establish deliberate indifference.

In Judge Manion’s second point, he suggested that although he believed the court correctly applied controlling precedent, this case is a “striking example” of how far courts have departed from the text of the Eighth Amendment. Judge Manion urged that courts should not

\[159\] Id. at 566 (Manion, J., concurring).
\[160\] Id.
\[161\] Id.
\[162\] Id.
\[163\] Id.
\[164\] Id.
\[165\] Id.
\[166\] Id.
\[167\] Id.
forget the Eighth Amendment prohibits “cruel and unusual punishment,” and that the deliberate indifference standard is tangentially related to the text, at best. Judge Manion emphasized that it seemed unlikely, from his perspective, that a prisoner who is taken to the hospital and entirely cured within five hours has endured anything cruel and unusual in the context of the prison system. In conclusion, Judge Manion suggested that courts should eventually return to faithfully applying the text of the Constitution.

ANALYSIS

The Seventh Circuit majority incorrectly decided Lewis v. McLean, et al. because it failed to consider controlling Seventh Circuit precedent. Its own precedent holds that an inmate, who complains that a delay in medical treatment rose to a constitutional violation, must place verifying medical evidence in the record to establish the detrimental effect of the delay. As follows, in delay-in-treatment cases, courts should apply the verifying medical evidence standard. If there is no evidence of a detrimental effect, a defendant should be entitled to judgment as a matter of law.

A. The Seventh Circuit Failed to Consider the Absence of Verifying Medical Evidence

Lewis’s objectively serious medical condition was a muscle spasm and accompanying back pain. There was an hour and a half

---

168 Id.
169 Id.
170 Id.
171 Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996).
172 “Detrimental effect” has not been squarely defined by the courts. Despite the lack of a conclusive definition, courts seem to operate under the assumption that equates detrimental effect to some degree of harm. Williams v. Liefer, 491 F.3d 710, 715 (7th Cir. 2007). The degree of harm must be attributed only to the delay and not the underlying medical condition. Id.
173 Lewis, 864 F.3d at 563.
delay between the time Cichanowicz and McLean learned of Lewis’s condition and Dr. Joseph’s directive prompting action. In light of these facts, the Seventh Circuit concluded that there was sufficient evidence for a reasonable jury to conclude that Cichanowicz and McLean were deliberately indifferent to Lewis’s medical needs. However, the Seventh Circuit’s analysis was incomplete as it failed to consider precedent set forth in Langston v. Peters. *Langston v. Peters* requires a plaintiff to place verifying medical evidence into the record that an alleged delay in medical treatment had a detrimental effect.

In cases where there is a delay in medical treatment, courts require the plaintiff to establish “verifying medical evidence” that the delay, rather than the underlying condition, caused harm. In *Langston v. Peters*, the Seventh Circuit adopted the Eighth Circuit’s standard that “[a]n inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed.” The Seventh Circuit previously maintained the injury subsequent to a delay as the deciding factor in a case.

This case hinges on Cichanowicz and McLean’s delay and, therefore, should implicate a *Langston* analysis. Yet, no such analysis took place on the part of the Seventh Circuit. The district court,

---

174 Id. at 563–64.
175 Id. at 565.
176 See *Langston*, 100 F.3d at 1240.
177 See e.g., *id.*; *Petty v. County of Franklin*, Ohio, 478 F.3d 341, 344 (6th Cir. 2007); *Laughlin v. Schriro*, 430 F.3d 927, 929 (8th Cir. 2005); *Surber v. Dixie County Jail*, 206 Fed. Appx. 931, 933 (11th Cir. 2006).
178 *Langston*, 100 F.3d at 1240; see also *Williams v Liefer*, 491 F.3d 710, 714-15 (7th Cir. 2007).
179 *Walker v. Peters*, 233 F.3d 494, 502 (7th Cir. 2000) (“The decisive factor, however, is that Walker has no evidence that he was injured by the defendants’ refusal on some occasions to provide him Factor VIII.”).
however, considered the verifying medical evidence standard. In doing so, the court concluded, "[Lewis]'s allegations of deliberate indifference [were] not enough at that point; [and] he [] also [had to] show with verifying evidence that defendants' actions caused him harm."  

While a handful of cases hold that brief delays in treatment may constitute deliberate indifference, these cases are readily distinguishable from Lewis v. McLean, et al. The most similar of these cases, in terms of the length of delay, is Williams v. Liefer. In Williams v. Liefer, Williams awoke with chest pains and soon thereafter complained to a prisoner officer. Despite his complaint, Williams was required to complete a physically demanding transfer out of segregation. Approximately five hours after his initial complaint to the officer, Williams blacked out and fell backwards while walking up the stairs. At the hospital, six hours after William's complaints, he was diagnosed with hypertension and chest pain. Williams's blood pressure decreased after an hour but he remained in the infirmary for six days.  

The material distinctions between this case and Williams are evident. First, the delay in Williams's treatment was six hours, whereas the delay in Lewis's treatment was an hour and a half.
Second, Lewis could stand and walk an hour after he was given pain medication, whereas William’s condition necessitated a six-day stay in the infirmary. This six-day stay in the infirmary essentially placed verifying medical evidence into the record that the delay caused Williams harm. No such evidence was presented by Lewis. Moreover, Lewis was discharged from the hospital ninety-one minutes after being admitted. Finally, in Williams, the delay itself was not related to safety concerns, but because Williams was moving from one building to another.

1. Precedential and Public Policy Concerns

Holding that an hour and a half wait, with no detrimental effects, violates the Eighth Amendment is dangerous precedent and is contrary to public policy. From a precedent standpoint, very few delay-in-treatment cases will now be decided at the summary judgment stage. While Judge Manion indicated that he did not read the majority’s opinion as contingent on the length of the delay the defendants caused, the majority made no mention that the time frame was narrowly confined to the specific facts of the case. Read broadly, an hour and a half delay in any treatment can now amount to

191 Id. at 560.
192 Williams, 491 F.3d at 713.
193 Lewis, 864 F.3d at 560.
194 Williams, 491 F.3d at 713.
195 The application of the verifying medical evidence standard, rather than a bright line rule that dictates how long of a wait is too long, is necessary for courts to come to consistent and logical outcomes. Consider if the facts of this case were the same but, rather than the inmate suffer from severe back pain, he suffered from a heart attack. The defendants, due to the same security concerns, waited over an hour and a half to take the inmate to the hospital. On the way to the hospital, the inmate dies due to heart failure. This is precisely verifying medical evidence that the delay, rather than the condition, caused harm. Without consideration of the impact the conduct had on the inmate, courts will be forced to erroneously decide how long is too long to delay treatment.
196 Lewis, 864 F.3d at 566 (Manion, J., concurring).
deliberate indifference of a serious medical need. This has implications in both the legal and medical fields.

The purpose of summary judgment is to prevent wasting judicial resources on unnecessary trials.\textsuperscript{197} The Lewis Court’s decision runs contrary to this principal as it substantially narrows the number of cases that will be disposed at the summary judgment stage. In practice, a delay amounting to an hour and a half or longer will now preclude granting summary judgment. Even more concerning is the potential that any delay will amount to deliberate indifference. Given the trajectory Seventh Circuit delay cases have taken, this is a realistic prospect.

From the medical perspective, the effects of this decision are equally devastating. First, this decision may place unattainable requirements on prison officials and prison medical professionals. Unfortunately, delays are common in prisons with limited resources.\textsuperscript{198} Delays, however, are not exclusive to prison health care but are present in nearly all health care circumstances. “In fact, the public often waits longer at hospital emergency rooms.”\textsuperscript{199}

Second, few medical professionals will be able to dispose of cases in the early stages of litigation. Significantly, prison medical professionals facing potential liability under the deliberate indifference standard risk being held personally financially accountable for the judgment; insurers often do not cover deliberate or intentional acts.\textsuperscript{200} The prospect of facing personal financial liability may disincentivize


\textsuperscript{199} Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996).

competent physicians from working in the prison health care system to protect themselves from liability. This may prove even more accurate as it will be difficult to decide claims early in litigation. The likely result: fewer competent physicians and a lower quality prison health care system.

2. Penological Concerns

The Supreme Court has regularly upheld prison regulations that may otherwise violate an inmate’s constitutional right where the regulation is legitimately related to penological concerns; in particular, when the regulation is necessary to protect institutional order and security. At the crux of this rationale is that internal security is a central goal of all corrections institutions. It is in light of these legitimate penological objectives that courts must assess challenges to prison regulations based on asserted constitutional rights of prisoners. While the Supreme Court has commented that security and medical needs do not ordinarily conflict, the needs in this case did.

Of significance, the Seventh Circuit did not take into consideration, nor even mention that the Wisconsin State Secure Program Facility in which Lewis was housed is a maximum-security prison. This narrow view of Lewis’s medical care and surrounding circumstances runs contrary to previous holdings of the court. The Seventh Circuit has long held that when examining a claim of deliberate indifference for either alleged action or inaction, it is

---

201 Sweeney, supra note 56, at 90.
203 Id. at 93.
205 Id.
obligated to examine the totality of the circumstances. In this case, however, the Seventh Circuit all but turned a blind eye to the fact that the delay was because of prison protocol and for safety purposes.

The Seventh Circuit decided cases that directly analyzed the interplay between deliberate indifference and penological interests. These cases stand for the proposition that an inexplicable delay in treatment supports an inference of deliberate indifference where there is no penological interest. Here, there was a penological interest that caused the delay, and yet, the Seventh Circuit paid this no lip service.

Applying the verifying medical evidence standard, the defendants should be entitled to judgment as a matter of law. Considering the complete absence of verifying medical evidence, the totality of the prison context, and the ease in which Lewis was treated, it is hard to imagine a reasonable fact finder concluding that the delay was so unreasonable that it amounted to cruel and unusual punishment.

B. Courts Should Return to Applying the Proscription of Cruel and Unusual Enumerated in the Constitution

The Eighth Amendment jurisprudence in this area has extended far beyond what “cruel and unusual” suggests to a lay person. The Eighth Amendment prohibits the imposition of cruel

---

207 Cavalieri v. Shepard, 321 F.3d 616, 625–26 (7th Cir. 2003); Dunigan ex rel. Nyman v. Winnebago County, 165 F.3d 587, 591 (7th Cir. 1999). See also Gutierrez v. Peters, 111 F.3d 1364, 1375 (7th Cir.1996).

208 See e.g., Petties v. Carter, 836 F.3d 722, 730 (7th Cir. 2016), as amended (Aug. 25, 2016), cert. denied (2017); Grieveson v. Anderson, 538 F.3d 763, 779 (7th Cir. 2008); Edwards v. Snyder, 478 F.3d 827, 830–31 (7th Cir. 2007).

209 See e.g., Petties, 836 F.3d at 730.

and unusual punishment.\textsuperscript{211} Therefore, it is instructive that the action or inaction is what is relevant in an Eighth Amendment inquiry. Yet, the deliberate indifference inquiry analyzes the intent of the individual alleged to have violated the constitution. The disconnect between the focus of both inquiries results in an unworkable standard.

1. The Deliberate Indifference Standard is Only Tangentially Related to the Text of the Constitution

Since the inception of the deliberate indifference standard, courts seem to have forgotten that the Amendment proscribes the infliction of cruel and unusual punishment.\textsuperscript{212} It is a stretch of monumental proportion to hold that Lewis endured anything cruel and unusual in the prison context, either by present day definition or as the framers intended. As Judge Manion highlighted in his concurrence: “this case is a striking example of how far we have departed from the text of the Eighth Amendment.”\textsuperscript{213}

2. Deliberate Indifference is Difficult to Apply and Does Not Get to the Heart of “Cruel and Unusual”

The deliberate indifference standard for cruel and unusual punishment in prisoner health care traditionally requires a showing of intent to harm.\textsuperscript{214} This requirement makes the standard amorphous and unworkable.\textsuperscript{215} Given that the text of the cruel and unusual punishment clause concerns the action or inaction taken in deciding whether there is a violation,\textsuperscript{216} it is inappropriate to hinge a finding of cruel and

\begin{itemize}
  \item \textsuperscript{211} U.S. Const. amend. VIII.
  \item \textsuperscript{212} See id.
  \item \textsuperscript{213} Lewis v. McLean, 864 F.3d 556, 566 (7th Cir. 2017) (Manion, J., concurring).
  \item \textsuperscript{214} Michael Cameron Friedman, Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard, 45 VAND. L. REV. 921, 946 (1992).
  \item \textsuperscript{215} Id. at 935.
  \item \textsuperscript{216} See generally U.S. Const. amend. VIII.
\end{itemize}
unusual punishment on the subjective state of the prison official or medical professional.\textsuperscript{217} The all-encompassing nature of prisons complicates attempts to determine intent because it is difficult to pinpoint whose intent is relevant.\textsuperscript{218} Additionally, many courts seem to infer intent on the part of the prison official\textsuperscript{219} or the prison medical professional.

The difficulties of the standard are evidenced by the range of court interpretations. The Seventh Circuit’s recent decisions alone paint a picture of inconsistency.\textsuperscript{220} Therefore, what should be relevant are the treatment itself and the harm, if any, the inmate suffered.

\textbf{C. State Law Medical Malpractice Claims are Best Fit for Actions Against Medical Professionals}

In \textit{Estelle}, the Supreme Court held that the proper forum for claims of substandard medical care is state medical malpractice lawsuits.\textsuperscript{221} Particular to this case, Lewis did not contend that he did

\textsuperscript{217} The dissent in Gamble stated, “whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.” \textit{Estelle v. Gamble}, 429 U.S. 97, 116 (1967) (Stevens, J., dissenting). \textit{See also} Friedman, \textit{supra} note 214, at 947.

\textsuperscript{218} Friedman, \textit{supra} note 214, at 947.


\textsuperscript{220} On January 30, 2017, less than six months before deciding \textit{Lewis v. McLean}, the Seventh Circuit decided \textit{Estate of Miller by Chassie v. Marberry}. In \textit{Miller}, inmate William Miller told various prison guards he suffered from a brain tumor and required placement on a bottom bunk; despite his medical need, he was placed on the top bunk. \textit{Estate of Miller by Chassie v. Marberry}, 847 F.3d 425, 426 (7th Cir. 2017). Miller fell off the top bunk twice; the second time breaking his back and suffering other serious injuries. \textit{Id.} at 426-27. The Court affirmed the district court’s grant of summary judgment on behalf of the defendants, reasoning that Miller did not sue the right defendants. \textit{Id.} at 427. The Court additionally reasoned that Miller’s communication to the guard that he had a brain tumor “[fell] short of demonstrating a serious medical need.” \textit{Id.} at 428.

not received care—he was taken to the hospital and prescribed ibuprofen and a muscle relaxant.\(^{222}\) Instead, Lewis argued that he received inadequate care because of the delay in his treatment. This is a quintessential claim of medical malpractice.

Where a prisoner has received some medical attention and the dispute is about the adequacy of the treatment, “federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.”\(^{223}\) The rationale behind this is that balance of protecting interests cannot be left to the unguided discretion of a judge or jury.\(^{224}\)

State medical malpractice laws are often best equipped to evaluate claims against medical professionals\(^{225}\) by requiring the support of an expert who is educated, trained and experienced in the area of health care or medicine at issue in the action.\(^{226}\) The policy underlying this requirement is that experts familiar with the field are able to testify, and guide the court to determine if the defendant deviated from the applicable standard of care.\(^{227}\) There is no expert witness affidavit requirement for federal claims of deliberate indifference under 42 U.S.C. § 1983.\(^{228}\) In effect, this leads to

\(^{222}\) Lewis v. McLean, 864 F.3d 556, 560 (7th Cir. 2017).

\(^{223}\) See e.g., Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976); Layne v. Vinzant, 657 F.2d 468, 474 (1st Cir. 1981); United States ex rel. Walker v. Fayette County, 599 F.2d 573, 575 n. 2 (3d Cir. 1979); Harris v. Thigpen, 941 F.2d 1495, 1507 (11th Cir. 1991).


\(^{225}\) Nearly all medical professionals can be held liable for deliberate indifference, not just physicians. See e.g., Berry v. Peterman, 604 F.3d 435, 443 (7th Cir. 2010) (holding nurse could reasonably be deemed to show deliberate indifference to inmate’s pain); Key v. Kolitwenzew, 630 Fed. Appx. 620, 623 (7th Cir. 2015) (holding inmate set forth a plausible account of facts that the physician’s assistant demonstrated deliberate indifference).

\(^{226}\) 735 ILCS 5/2-622.


\(^{228}\) See e.g., Brief for Correctional Medical Services, Inc. as Amicus Curiae, p. 15, Correctional Medical Services, Inc. v. Alma Glisson, Personal Representative of
unwarranted and frivolous lawsuits against prison health care providers that are unsupported by law or medicine.\textsuperscript{229}

The economics of inmate-initiated litigation is abundantly present in the conversation. On the one hand, retaining an expert may be prohibitively expensive for an inmate.\textsuperscript{230} If an inmate cannot retain an expert, he cannot file\textsuperscript{231} a medical malpractice action.\textsuperscript{232} Courts are not authorized to offer financial assistance to inmates to hire expert witnesses, as they are not similarly authorized to do so for non-prisoners.\textsuperscript{233} On the other hand, inmate litigation is inherently unique.\textsuperscript{234} This uniqueness includes: free time, seeing litigation as “recreation,” incentives to humiliate their jailors, access to legal materials,\textsuperscript{235} “proclivity to violate the law,” and a lack of financial or other disincentives for pursuing meritless claims.\textsuperscript{236}

CONCLUSION

A minor delay in treatment is a disappointing disparity from deliberate indifference leading to cruel and unusual punishment. Given the present-day framework of the deliberate indifference standard, courts considering alleged violations of constitutional rights should

\textsuperscript{229} Id.
\textsuperscript{230} See Chapman, supra note 74.
\textsuperscript{231} Few medical malpractices cases do not require expert testimony. \textit{Res Ipsa Loquitur} claims, Latin for “the thing speaks for itself,” do not require expert testimony where negligence is obvious and within the common knowledge of a juror. Examples of this include operating on the wrong limb or leaving surgical instruments or sponges within the body. B. Sonny Bal, \textit{An Introduction to Medical Malpractice in the United States}, CLIN. ORTHOP. RELAT. RES. 467(2): 384 (2009).
\textsuperscript{232} See 735 ILCS 5/2-622.
\textsuperscript{234} See Johnson v. Daley, 339 F.3d 582, 599 (7th Cir. 2003).
\textsuperscript{235} Including “inmate writ-writers” who engaged in unauthorized practice of law.
\textsuperscript{236} See \textit{id.} at 592-93.
concentrate on the inmate’s treatment and the harm, if any, the inmate suffered, rather than the intent of the accused individual. Accusations of harm should require reinforcement by medical records or medical expert testimony. Until courts return to applying the text of the constitution, these modifications are necessary to ensure that claims under the cruel and unusual punishment provision of the Eighth Amendment are truly cruel and unusual.