EIGHTH AMENDMENT AND DELIBERATE INDIFFERENCE STANDARD FOR PRISONERS: EIGHTH CIRCUIT OUTLOOK

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I. INTRODUCTION

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor shall excessive fines imposed, nor cruel and unusual punishment inflicted."\(^1\) The treatment an individual receives once he has been convicted and confined to a prison is subject to scrutiny under the Eighth Amendment.\(^2\) Punishment that deprives an inmate of the "minimal civilized measures of life's necessities" is said to be cruel and unusual.\(^3\) This article will focus on the "cruel and unusual punishment" clause of the Eighth Amendment as it applies to convicted prisoners in the United States Court of Appeals for the Eighth Circuit and district courts.

II. HOW COURTS ENFORCE THE EIGHTH AMENDMENT

Congress passed Title 42 U.S.C. section 1983 as a remedial statute for the purpose of allowing an individual subjected to cruel and unusual punishment a remedy\(^4\) against individuals acting under color of state law.\(^5\) Section 1983 was designed to provide "a broad remedy

\(^1\) U.S. Const. amend. VIII (emphasis added). The Eighth Amendment is applicable to the states through the Fourteenth Amendment. Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981) (citing Robinson v. California, 370 U.S. 660 (1962)).
\(^3\) Whitnack v. Douglas County, 16 F.3d 954, 957 (8th Cir. 1994) (quoting Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989)).
\(^4\) See 42 U.S.C. § 1983 (1994) which provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory . . . subjects, or causes to the 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 proceedings for redress.

\(^5\) The Eighth Circuit adopted the Ninth Circuit's approach holding that "acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county or municipal law, ordinance or regulation." See Ninth Circuit Model Jury Instruction § 11.01.01. See also Eighth Circuit Model Jury Instruction § 4.40 (citing Monroe v. Pape, 365 U.S. 167 (1961), overruled in part,
for violations of federally protected civil rights." 6 Section 1983 does not, by itself, provide any substantive rights. 7 For instance, one cannot go into court and claim a violation of section 1983 - for section 1983 by itself "does not protect anyone against anything." 8 Instead, section 1983 provides a remedy for vindicating violations of all rights, privileges and immunities secured by law. 9

To state a claim under 42 U.S.C. section 1983, a civil rights plaintiff must establish two essential elements: (1) the violation of a right "secured by the Constitution or laws of the United States" and (2) that the person who committed the alleged deprivation was "acting under color of state law." 10

III. ROOTS OF THE EIGHTH AMENDMENT OF PROOF IN PRISONER CLAIMS: DELIBERATE INDIFFERENCE STANDARD

To prevail on a claim under the Eighth Amendment, an inmate must show both an objective element that the deprivation was sufficiently serious, and a subjective element that the defendant acted "with a sufficiently culpable state of mind." 11 The predominant language used by the modern courts to describe conduct that rises to an Eighth Amendment violation is "deliberate indifference." 12 The Eighth Circuit has adopted a two prong test wherein deliberate indifference is established. First, there must be actual knowledge of a sub-

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6. Monell v. Department of Social Serv. of New York City, 436 U.S. 658 (1978). Cases brought under 42 U.S.C. § 1983 are brought against individuals and not entities. For example, supervisors are not liable for Eighth Amendment claims brought under section 1983 on a respondeat superior theory. Therefore, supervisors must have some direct personal involvement for liability to attach. Boyd v. Knox, 47 F.3d 966, 968 (8th Cir. 1995); Knolow v. Nix, 29 F.3d 855, 858 (8th Cir. 1994); Choate v. Lockhart, 7 F.3d 1370, 1376 (8th Cir. 1993).


8. Chapman, 441 U.S. at 617.


11. See Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997) (citing Choate, 7 F.3d at 1373).

stantial risk of harm to the plaintiff. Second the defendant must fail “to take reasonable measures to deal with the problem.”

Implicit in the two prong test is the fact that deliberate indifference is not evinced by inadvertence or mere negligence. Rather, deliberate indifference requires a showing of actual subjective intent or recklessness in a criminal sense.

To realize why the Eighth Amendment requires such a high degree of culpability to be actionable, one would need to understand the origins of the Eighth Amendment. Although few courts take the time to explain the origins of the “cruel and unusual punishment” clause of the Eighth Amendment, one judge who commonly incorporates the history of the amendment in his opinions states that the original text dates back to the English Bill of Rights in 1689. The Eighth Amendment was adopted into the United States Constitution to limit government power and the abuse of that power against convicts. Early Eighth Amendment cases dealt with the death penalty and various forms of execution. In the early 1990’s, the Supreme Court expanded its interpretation of the term “cruel and unusual punishment” and acknowledged that the term could mean different things at differ-


14. Id.

15. Id. The comments for the Committee on Model Jury Instructions explain that Farmer “clearly limits deliberate indifference to intentional knowing recklessness in the criminal context which requires actual knowledge of a serious risk.” Id. The comments also interpret the Supreme Court to prelude liability under the Eighth Amendment based on a showing of recklessness in a tort context. Id.

16. Judge Mark Bennett explains the origins of the Eighth Amendment in three (3) opinions. See generally Starbeck v. Linn County Jail, 871 F. Supp. 1129, 1139 (N.D. Iowa 1994) (involving deliberate indifference to serious medical needs); Holloway v. Wityry, 842 F. Supp. 1193, 1196 (S.D. Iowa 1994) (concerning failure to protect from attack by other inmates); Risdal v. Martin, 810 F. Supp. 1049, 1052 (S.D. Iowa 1993) (concerning excessive use of force case involving correctional officers use of force in prison context) (citing Anthony F. Granucci, “Nor Cruel and Unusual Punishment Inflicted” The Original Meaning, 57 Cal. L. Rev. 839, 844-47 (1969)). After the language was drafted by Parliament and ratified at the accession of the new monarchs William and Mary, the State of Virginia adopted the language verbatim in its own Declaration of Rights in 1776. Granucci, 57 Cal. L. Rev. at 844-47. Thereafter, eight other states adopted the “cruel and unusual punishment” clause which became the Eighth Amendment to the United States Constitution in 1791. Id.


18. See, e.g., Gregg v. Georgia, 428 U.S. 153, 158 (1976); Estelle v. Gamble, 429 U.S. 97, 102 (1976). In the early cases, punishment did not violate the Eighth Amendment if it was not “barbarous” or “torturous.” Starbeck, 871 F. Supp. at 1139; Holloway, 842 F. Supp. at 1197; Risdal, 810 F. Supp. at 1053 (citing Estelle, 429 U.S. at 102; Gregg, 428 U.S. at 171).
ent times. The modern Court uses the phrase "evolving standard of decency" to mark the progress of a maturing society." For example, "only those deprivations denying 'the minimal civilized measures of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." The question of what is "decent" and what constitutes "the minimal civilized measures of life's necessities" varies depending on the nature of the Eighth Amendment claim.

IV. DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS

An inmate who brings an Eighth Amendment claim alleging that he or she has been deprived of medical care must show "that the prison official was deliberately indifferent to the inmate's serious medical needs." A prevailing inmate must show both that he or she had an objectively serious medical need and that the prison official knew

19. Through Judge Bennett's historical analysis, one can trace the conservative verses liberal paths of the Eighth Amendment. As previously stated, the Eighth Amendment focused on the death penalty and then the various forms of execution. As our society matured, the Eighth Amendment broadened and perhaps, as society became more liberal, so to did the Court's application of the Eighth Amendment. In Weems v. United States, the Court, expanded the role of the Eighth Amendment stating: "time works changes, and brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910). The Court went on to provide that the "cruel and unusual punishment" clause has an expansive and vital character which "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by human justice." Weems, 217 U.S. at 378. See generally Starbeck, 871 F. Supp. at 1139-40; Holloway, 842 F. Supp. at 1197; Risdal, 810 F. Supp. at 1053.

20. Estelle, 429 U.S. at 106.


22. Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997) (citing Camberos v. Branchard, 73 F.3d 174, 175 (8th Cir. 1995)). The landmark case which first explained the deliberate indifference standard was the medical indifference case of Estelle v. Gamble. See Estelle, 429 U.S. at 104. The Supreme Court in Estelle applied the Eighth Amendment to prisoner medical claims. Id. at 104-06. An important feature of Estelle is that the Court, in setting out this new standard, made a distinction between a prisoner challenging his medical care because the prison official was negligent (malpractice) and instances where the prison official consciously disregarded a serious medical condition. Id. See also EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS § 4.31 (1995).
about the need and consciously disregarded it. Each step of the inquiry is fact sensitive and normally requires expert testimony.

A. Serious Medical Need

"A serious medical need is one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that a layperson would easily recognize the necessity for a doctor's attention." There is no consistent guideline in recent Eighth Circuit opinions to steer the civil rights practitioner as to what the definition actually means.

In Coleman v. Rahija, the Eighth Circuit found that a pregnant inmate experiencing symptoms of labor with a history of pre-term births and rapid deliveries constituted a serious medical need. The approach the Eighth Circuit took in its analysis of whether there was a serious medical need in Coleman is somewhat confusing. For example, the court acknowledged that a serious medical need could be established if the condition is "so obvious that even a layperson would easily recognize the necessity for a doctor's attention." The court also went on to cite its prior decision in Crowley v. Hedgepeth that the objective reasonableness of the deprivation should also be measured by reference to the harm it caused in its test to determine whether one had a serious medical need.

Although "harm" would seem to be more relevant to the issue of "deliberate indifference," the Eighth Circuit has used a "harm index" in the "medical needs" analysis. The "harm index," would appear to be:

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23. Coleman, 114 F.3d at 784 (citing Miller v. Schoenen, 75 F.3d 1305, 1309 (8th Cir. 1996)). See Estelle, 429 U.S. at 105 (annunciating the two (2) prong test); Farmer, 114 S. Ct. at 1978-79 (discussing the requirement of showing objective reasonableness in a tort context coupled with a subjectively culpable state of mind which lies somewhere between tort and criminal intent). The Eighth Circuit Model Jury Instruction for Denial of Medical Care sets out the two objective and subjective requirements by requiring the plaintiff prove that the "(1) defendant was aware of the inmate's serious need for such medical care and that the (2) defendant, with deliberate indifference, failed to provide the medical care or allow the inmate to obtain the needed medical care within a reasonable time." EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS § 4.31 (1995).

24. See generally Coleman, 114 F.3d at 778 (8th Cir. 1997) (applying the standard to a pregnant inmate).


26. Coleman, 114 F.3d at 784; Aswegan, 49 F.3d at 464. See Johnson v. Busby, 953 F.2d 349 (8th Cir. 1991) (approving the definition for serious medical need).

27. 114 F.3d 778 (8th Cir. 1997).

28. Coleman, 114 F.3d at 784.

29. Id. (citing Cambaros, 73 F.3d at 176).

30. 109 F.3d 500 (8th Cir. 1997).

31. Coleman, 114 F.3d at 784 (quoting Crowley, 109 F.3d at 502).

32. Coleman and Crowley appear to have conflicting holdings. In Crowley, the inmate suffered from Sickle Cell Anemia which caused Crowley to have a light sensitivity condition called Photophobia. Crowley, 109 F.3d at 502. Crowley's condition was severe
work in the exact opposite if applied to the Coleman and Crowley cases. In both cases, there was a doctor who testified that the inmate had a serious medical need. In both cases, the inmate had suffered some unnecessary pain and emotional distress due to the delay in treatment. In both cases, the inmate was eventually treated. In Coleman, the inmate who was denied proper medical treatment during most of her labor delivered a normal healthy baby. In Crowley, the inmate eventually underwent surgery and was given protective eyewear for his photophobia condition.33 Crowley's photophobia pain lasted a considerably longer period of time than did Coleman's labor pains.34

Prior to the Coleman and Crowley cases, the Eighth Circuit addressed the question of "what constitutes a serious medical need" in Beyerbach v. Sears35 and Aswegan v. Henry.36 In Beyerbach, the Eighth Circuit indicated that an objectively serious medical need must enough that the prison doctor prescribed special eyewear. Id. at 501. The prison doctor also stated that Crowley had a serious medical need. Id. The Eighth Circuit noted in Crowley that the inmate's condition did not worsen despite the immense pain Crowley was forced to endure as a result of the deprivation and held that Crowley did not have a serious medical need. Id. at 502.

In Coleman, the inmate was forced to undergo some emotional distress. Coleman, 114 F.3d at 784-85. Nevertheless, she delivered a healthy baby and had no lasting physical manifestations from the deprivation. Id. Both inmates suffered emotional distress and neither had an aggravation of their condition. It may stand to reason that what the Eighth Circuit is really trying to say is that a condition is only actionable where there is a proven cure or treatment for the condition which amounts to more than pain treatment.

For example, in Beyerbach v. Sears, the Eighth Circuit held that there was insufficient evidence of objective seriousness when no medical evidence that the delay in treatment produced any harm. Beyerbach v. Sears, 49 F.3d 1324, 1326-27 (8th Cir. 1995). In Bailey v. Gardebring, an inmate unsuccessfully brought an action against prison officials for failing to provide him psychiatric treatment such as a sexual offenders program. Bailey v. Gardenbring, 940 F.2d 1150, 1154-55 (8th Cir. 1991). The Eighth Circuit held that a condition for which there is no known or generally recognized method of treatment cannot serve as a predicate for the conclusion that failure to provide treatment constituted deliberate indifference to a serious medical need. Bailey, 940 F.2d at 1155. See Starbeck v. Linn County Jail, 871 F. Supp. 1129, 1143 (N.D. Iowa 1994); Warren v. Missouri, 995 F.2d 130, 131 (8th Cir. 1993). But see Johnson-El v. Schoemehl, 878 F.2d 1043, 1055 (8th Cir. 1989) (holding that a delay in treatment can constitute an Eighth Amendment violation where the treatment is designed to relieve pain).

33. Crowley, 109 F.3d at 501.
34. Coleman, 114 F.3d at 784; Crowley, 109 F.3d at 501. Interestingly, the Eighth Circuit had previously held that a "delay in the provision of treatment or in providing examinations can violate inmates' rights when the inmates' ailments are medically serious or painful in nature." Johnson-El, 878 F.2d at 1055. It would stand to reason that since the prison physician found that the inmate in Crowley needed the eyewear to reduce pain, despite the fact lack thereof would not cause the inmate's condition to deteriorate, an Eighth Amendment claim for deliberate indifference existed. It is therefore difficult to reconcile Crowley and Coleman.
35. 49 F.3d 1324 (8th Cir. 1995).
36. 49 F.3d 461 (8th Cir. 1998).
be supported by sufficient medical evidence.37 In Aswegan, the court stated that "[t]o constitute an objectively serious medical need or a deprivation of that need, we have repeatedly emphasized that the need or the deprivation alleged must be either obvious to the layperson or supported by medical evidence."38 While the Eighth Circuit seems to provide two alternative methods of proving the objective existence of a serious medical need, there is little authority in recent years to demonstrate what evidence an injured party would need to introduce to show that the medical need was so serious that a layperson would understand the need for medical attention.39 Despite some of the confusion, it is clear that conditions requiring surgery satisfy the objectively reasonable test,40 as do many medical needs which do not, so long as there is verifying medical evidence.41

37. Beyerbach, 49 F.3d at 1326. The requirement of a showing of "sufficient verifying medical evidence" was explained in Coleman to contrast the Court's prior conclusions in Beyerbach and Crowley. Coleman, 114 F.3d at 785. However, despite the Court's statement that "[e]ach step of the inquiry is fact-sensitive" the Coleman decision lacks a discussion as to why the evidence in Beyerbach and Crowley failed to meet the objective test. Id. While it was true that there was more reliance on expert testimony by the parties in Coleman, there was an abundance of medical records and physician testimony submitted in Crowley to support a claim at the summary judgment stage. Id. See Aswegan, 49 F.3d at 464. Cf. Boswell v. County of Sherburne, 849 F.2d 1117, 1122 (8th Cir. 1988); Farmer, 114 S. Ct. at 1982-84 (noting that an Eighth Amendment violation can be established by evidence showing substantial risk to inmate's health when longstanding, pervasive, well-documented, or expressly noted by prison officials in that past).

38. Aswegan, 49 F.3d at 464 (citing Beyerbach, 49 F.3d at 1326-27 ("insufficient evidence of objective seriousness when no medical evidence that the delay in treatment produced any harm"); Kayser v. Caspari, 16 F.3d 280, 281 (8th Cir. 1994) ("insufficient evidence of serious medical need when the medical need claimed is based on bare assertion of inmate"). Johnson v. Busby, 953 F.2d 349, 351 (8th Cir. 1991) ("serious medical need only if ‘diagnosed by physician as requiring treatment, or . . . so obvious that even a layperson would easily recognize the necessity for a doctor’s attention’.").

39. In Starbeck, Judge Bennett cites several cases, mostly from outside of the Eighth Circuit, where the two prong "objective reasonable" test has been applied to determine whether a serious medical need existed. Starbeck, 871 F. Supp. at 1141 (citing Johnson, 953 F.2d at 351; Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980); West v. Keve, 571 F.2d 158, 162-63 n.6 (3rd Cir. 1978); Johnson v. Vondera, 790 F. Supp. 898, 900 (E.D. Mo. 1992); Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977)). Although the Eighth Circuit test under Johnson allows for a serious medical need to be established under the "obviousness" to a layperson standard, the Court has also stated that a serious medical need cannot be established by a Plaintiff's self diagnosis. See, e.g., Kayser v. Caspari, 16 F.3d 280, 281 (8th Cir. 1994).


41. Id. (citing Fields v. Gander, 734 F.2d 1313 (8th Cir. 1984) ("infected teeth"); Mullen v. Smith, 738 F.2d 317 (8th Cir. 1984) ("back and head injuries which prohibited prisoner from walking"); Miltier v. Beorn, 896 F.2d 848, 852 (4th Cir. 1990) ("repeated
B. Deliberate Indifference

"Deliberate indifference is established only if there is actual knowledge of a substantial risk that the plaintiff would be exposed to harm and the defendant disregards that risk by intentionally refusing or failing to take reasonable measures to deal with the problem."

In the medical needs context, deliberate indifference can be shown in a variety of ways. Nevertheless, the task of proving deliberate indifference is very difficult. In Farmer v. Brennan, the Supreme Court held that a prison official may be liable under the Eighth Amendment if he or she knows that an inmate faces a substantial risk and fails "to take reasonable measures to abate it." The Eighth Circuit has provided that the failure to treat a medical condition does not amount to deliberate indifference "unless prison officials knew that the condition created an excessive risk to the inmate's health and then failed to act on that knowledge."

Implicit in the definition of "deliberate indifference" is a requirement that the person committing the alleged constitutional violation must have acted with a subjective or culpable state of mind. The Eighth Circuit has stated that in order to satisfy the subjective state of mind requirement, the Supreme Court requires "knowledge" on the part of the alleged violator. Although courts have universally held that "knowledge" and "subjective intent" are needed to prove deliberate indifference, the extent to which a plaintiff must prove subjective culpability is not a precise science. For example, it is clear that

47. In Coleman, the Eighth Circuit followed the Supreme Court stating:
[i]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk [to the inmate's health] was longstanding, pervasive, well-documented, or expressly noted in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.
Coleman, 114 F.3d at 786 (quoting Farmer, 114 S. Ct. at 1981-82). See, e.g., Jensen v. Clarke, 94 F.3d 1191, 1195 (8th Cir. 1996) (following Farmer's requirement of actual knowledge). In Ramos v. Lamm, the United States Court of Appeals for the Tenth Circuit noted that Courts have consistently held that the knowledge of the need for medical care and the intentional refusal to provide that care are more than negligence and constitute deliberate indifference. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980).
48. Farmer, 114 S.Ct. at 1978-79. Because "deliberate indifference" requires one to introduce evidence of a sufficiently culpable state of mind, one proving the case must
"negligence" is not enough to prove deliberate indifference. As such, an inmate cannot sustain a medical malpractice claim against a doctor or a prison official under the Eighth Amendment. On the other hand, "reckless" conduct is sufficient to sustain the burden of proving deliberate indifference. In those cases where "reckless" conduct is alleged, the courts normally require that the "reckless" conduct meet

show some level of intent to be blameworthy. Id. at 1979 ("Our 'cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment.") (quoting Wilson, 501 U.S. at 299). See Choate v. Lockhart, 7 F.3d 1370, 1373 (8th Cir. 1993). As such, acts which are accidental or inadvertent are not actionable. See, e.g., Starbeck, 871 F. Supp. at 1143 n.9 (holding that a mechanical malfunction which thwarted first attempt at execution which was accidental is not actionable under Eighth Amendment because negligence did not constitute "wanton" infliction of pain) (citations omitted). However, the subjective mind requirement may be shown, in some circumstances, by proving "knowledge of a risk" or "constructive knowledge." Farmer, 114 S. Ct. at 1980. See also Wilson, 501 U.S. at 302 (explaining that wantonly and sadistically for the very purpose of causing harm is what is meant by deliberate indifference).


50. Ordinarily, a claim for medical malpractice (professional medical negligence) requires a showing that the physician deviated from the community standard of care. Medical malpractice is governed under the law of the state where the action occurred. Under the Eighth Amendment standard for deliberate indifference to a serious medical need, practices which fall below the community standard are not part of the standard of review. The Plaintiff, rather, needs to look into the doctor's mind. For instance, a doctor's attitude and conduct in response to an inmate's serious medical needs along with a standard which falls below the community norm may be actionable. Helling v. McKinney, 509 U.S. 25, 32 (1993); Starbeck, 871 F. Supp. at 1144. Nevertheless, ordinary negligence even if the negligence is "gross negligence" does not meet the subjective state of mind requirements of deliberate indifference. Whitley, 475 U.S. at 319, 321; Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990).

51. "Deliberate indifference is limited to situations where the violator has acted with intent, knowledge or recklessness in the criminal law context which requires actual knowledge of a serious risk." See EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS § 4.44 (1995). According to the Comments from the committee on Model Jury Instructions:

The court is limiting eighth amendment claims to those in which plaintiff can show actual subjective intent rather than just recklessness in the tort sense. In Wilson, the court characterized as eighth amendment violations only acts which are "deliberate acts intended to chastise or deter" or "punishment which has been administered for a disciplinary purpose". The court, continuing to follow the deliberate indifference standard, clearly stated that negligence was not sufficient.

Id. (citation omitted)(emphasis added). Although "gross negligence" is not sufficient to state an Eighth Amendment claim, a diagnosis or treatment which is grossly incompetent or so deviates from professional standards of conduct can rise to the level deliberate indifference. Starbeck, 871 F. Supp. at 1145 (citing Smith, 919 F.2d at 93).
the criminal "reckless" standard rather than the tortious "reckless" standard.\textsuperscript{52} This must be evaluated on a case-by-case basis.

V. DELIBERATE INDIFFERENCE TO SAFETY RIGHT: FAILURE TO PROTECT

Prison officials have a duty to protect prisoners from violence at the hands of other prisoners.\textsuperscript{53} Deliberate indifference to safety rights of an inmate normally manifests itself where prison officials either fail to protect an inmate from a specific threat of violence or allow a stream of violence to pervade the institution. In order for an inmate to prevail in a "failure to protect" case, prison officials must act with "deliberate indifference" similar to its "medical indifference" cause of action.

Not every attack by one inmate on another inmate is actionable under the Eighth Amendment. In order for an inmate to prevail on a "failure to protect" claim under the Eighth Amendment, he or she must show that the defendant prison official was aware of the "substantial risk of such attack, that the defendant acted with deliberate indifference to the inmate's need to be protected from the attack and in so doing, failed to protect the inmate from the attack."\textsuperscript{54} Again, both "knowledge" and "intent" are required elements of the cause of action.

A. PERVERSIVE RISK OF HARM

A claim based on a failure to protect requires the inmate to prove that "he is incarcerated under conditions posing a substantial risk of


\textsuperscript{53} As with a claim for "medical indifference," an inmate bringing an action based on the "failure to protect" theory must establish that there is actual knowledge of a substantial risk that the inmate will be attacked and that the prison official disregarded that "known" risk by intentionally refusing or failing to take reasonable measures to deal with the problem. \textit{Eighth Circuit Model Jury Instructions} § 4.44 (1995) (citing \textit{Farmer}).

\textsuperscript{54} \textit{Eighth Circuit Model Jury Instruction} § 4.32 (1995). It is important to realize that the protection an inmate is afforded against other inmates is a condition of confinement. \textit{Wilson v. Seiter}, 501 U.S. 294, 303 (1991).
serious harm.”55 Prisons by their very nature are sometimes dangerous, violent, and unpredictable.56 Not every injury suffered by one inmate at the hands of another translates into constitutional liability against the institution's officials.57 The Supreme Court has held that a prison official shall be found liable under an Eighth Amendment “failure to protect” claim if the Plaintiff can prove (1) the deprivation alleged is objectively sufficiently serious58 and (2) the prison official's act or omission results in a "denial of “the minimal civilized measures of life’s necessities.”59

It is clear that proof of a single, isolated incident of violence is ordinarily not sufficient to prove a pervasive risk of harm.60 However, a pervasive risk of harm may be established by something “less than proof of a reign of violence and terror in the particular institution.”61 Proving a pervasive risk of harm may be accomplished by showing that violence occurs with enough frequency that an environment of fear exists to such an extent that inmates reasonably fear for their safety.62 Equally important, prison officials must be “aware of the problem and aware of the need for protective measures.”63

B. Deliberate Indifference

Deliberate indifference is established where a prison official has actual knowledge of a substantial risk that the inmate's safety is in danger and where the official disregards knowledge of that risk.64 A

56. See generally Falls v. Nesbit, 966 F.2d 375 (8th Cir. 1992) (addressing violence towards physically weaker inmates).
58. Id. (citing Wilson, 501 U.S. at 298; Hudson v. McMillian, 503 U.S. 1, 8 (1992)).
60. See Andrews v. Siegel, 929 F.2d 1326, 1330 (8th Cir. 1991); Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984) (holding that a pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidents). See also Eighth Circuit Model Jury Instructions § 4.42 (1995).
62. Andrews, 929 F.2d at 1330.
63. Id. In Smith v. Arkansas Dep't of Corrections, evidence that violence, robbery and rape were common in unsupervised prison barracks was sufficient to show the existence of an “objectively substantial risk of personal injury.” Smith v. Arkansas Dep't of Corrections, 103 F.3d 637, 645 (8th Cir. 1996).
deliberately indifferent prison official can disregard the risk by intentionally refusing or failing (by omission) to deal with the problem.65

As with a “medical indifference” claim, a prison official must have a sufficiently culpable mental state of deliberate indifference towards an inmate’s safety.66 In a “failure to protect” case, the inmate must prove that the prison official was actually aware of the events from which the inference of substantial risk could be drawn and must draw the inference.67

The standard is very difficult and impractical, placing an incredible burden on the inmate. In an ideal world, an inmate should be able to confide in correctional officers and security staff and relay to prison officials concerns about being attacked. In reality, a prison inmate will likely place himself at higher risk by relaying a possible attack by other inmates, who will in turn label him or her a “snitch” or informer. The other reason this standard places an impractical demand on inmates is that most inmates are not constitutional scholars and have very little or no education. Inmates are often not intelligent or sophisticated enough to adequately articulate their perceived threat to sufficiently charge prison officials with knowledge.

Inmates who do assume the risk of relaying a perceived threat to their safety will normally do so in general terms. An example would be where an inmate sends a written message to the security director which either advises the official of the identity of the potential attacker with no other information or describes an approximate time or place of a possible attack. Under these situations, a prison official can be said not to have sufficient information to draw the required inference.68 This problem is compounded by the fact that there is little authority which requires a prison official to follow up on the “general” or unspecific information, allowing for appropriate preventive steps.69

65. In Farmer, the United States Supreme Court held in pertinent part:

... 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 the inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. ... An official’s failure to alleviate a significant risk that he should have perceived but did not, ... cannot . . . be condemned as the infliction of punishment.


68. Randle, 48 F.3d at 304.

69. One aspect the Court in Farmer failed to address was the duty a prison official has to investigate and educate himself on the perceived threat where an individual inmate approaches him or her for protection.
Where threats between inmates are common, knowledge of a substantial risk of harm will not, in all situations, be imputed to prison officials based on the threats alone.⁷⁰

Although there is no affirmative duty requiring prison officials to investigate or follow up on a vague or general threat, "there may be circumstances... [w]here a fact finder may conclude a prison official was aware of it."⁷¹ Nevertheless, to prove this, one must prove actual conduct or conscious disregard. That is, "it is not enough that a reasonable person would have been aware of the risk; the prisoner must demonstrate by facts, and reasonable inferences therefrom, that the particular defendant was aware of the substantial risk at issue."⁷² Even where an inmate has relayed sufficient information to require officials to take affirmative steps to protect the inmate, the official will avoid liability if the protective response is reasonable.⁷³

C. Failure to Intervene

While it is clear that proof of a single or isolated incident of violence is not sufficient to prove a pervasive risk of harm,⁷⁴ one can prove a "failure to protect" claim where the single or isolated instance involves a prison employee's failure to intervene once the attack or violence is in progress.⁷⁵ "A prison official acts with deliberate indifference to an inmate's safety when the official is present at the time of an assault and fails to intervene or otherwise act to end the assault"⁷⁶ unless the failure to respond was justifiable.⁷⁷ Even where a guard is...

⁷⁰ Prater v. Dahm, 89 F.3d 538, 541 (8th Cir. 1996).
⁷¹ Id. at 542 (citing Farmer, 114 S. Ct. at 1981).
⁷² Davis v. Scott, 94 F.3d 444, 446 (8th Cir. 1996) (holding that the inmate provided sufficient evidence that his attacker had a propensity for violence, that the official knew of that propensity because it was reflected in the attacker's prison record and that exposing the inmate to such a prisoner, even in administrative segregation, was unreasonable, in light of the pervasive risk to the inmate).
⁷³ Farmer, 114 S. Ct. at 1982; Prater, 89 F.3d at 541. See, e.g., Jones v. Kelly, 918 F. Supp. 74, 79 (W.D.N.Y. 1995). In the Jones case, an inmate was placed in danger when he was transferred to another facility and became the target of a cell fire and attacks by his fellow inmates. Jones, 918 F. Supp. at 80. In this case, the risk of harm to the inmate was substantial. Id. at 79. However, prison officials took reasonable measures in response to the risk. Id. Even where there may have been some negligence in transferring the inmate or some inadvertence, the court allowed the prison official to avoid liability because the officials appeared to act in good faith.
⁷⁵ Williams v. Mueller, 13 F.3d 1214, 1216 (8th Cir. 1994); Wright v. Jones, 907 F.2d 848, 850 (8th Cir. 1990).
⁷⁶ Williams, 13 F.3d at 1216.
⁷⁷ There will always be situations where prison guards are unwilling to stop an attack where the unwillingness was due to a threat to the guard's own safety or where the safety of others is concerned. See, e.g., Williams v. Willits, 853 F.2d 566, 591 (8th Cir. 1988) (involving a prison guard who believed that attempting to break up fight between two inmates would place himself and others in danger and thus did not violate
not in a position to safely break up a fight, the guard would, nevertheless, have a duty to summon help.\textsuperscript{78} “Failure to protect” cases like its medical indifference counterpart, is very fact sensitive. It is important to be familiar with the approach of the district in which a case is filed.\textsuperscript{79}

VI. EXCESSIVE USE OF FORCE

Prison officials need to use force in a prison setting. Force is a natural and ordinary aspect of prison life. When a guard places handcuffs on an inmate, or escorts an inmate in leg chains, this is a use of force. Guards are often faced with prison disturbances and are forced to use mace, the use of the chemical agent is a “use of force.” In many cases, force is accidentally used against the wrong person. In several of these instances, the force used is extreme and may cause great pain or injury to the inmate. In the majority of cases where force is used (even against innocent inmates) it is constitutionally permissible.

After incarceration, only the “unnecessary and wanton infliction of pain,” without penological justification, constitutes cruel and unusual punishment forbidden by the Eighth Amendment.\textsuperscript{80} “Obduracy and wantonness” are terms that characterize the conduct prohibited by the Eighth Amendment.\textsuperscript{81} In order for force to be excessive under the Eight Amendment, the force must be excessive and applied maliciously and sadistically for the very purpose of causing harm and not in a good faith effort to achieve a legitimate purpose.\textsuperscript{82} "In determin-

\textsuperscript{78} See Holloway, 842 F. Supp. at 1200 (holding that rights were violated when a prison official observed and allowed an inmate to be subjected to multiple attacks over an extended period of time without summoning help).


\textsuperscript{80} Whitley v. Albers, 475 U.S. 312, 319 (1986); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Rodgers v. Thomas, 879 F.2d 380, 384 (8th Cir. 1989). See also Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (articulating standard in excessive force cases for both convicted and unconvicted persons). In Graham v. Connor, the Supreme Court created a second standard for unconvicted persons (Fourth Amendment excessive force cases) using an objective reasonable test which left the “objective and subjective” test in Jonson for convicted prisoners (Eighth Amendment excessive force cases). Graham v. Connor, 490 U.S. 386, 393-95 (1989). See also EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS § 4.30 (1995).

\textsuperscript{81} Whitley, 475 U.S. at 319.

\textsuperscript{82} Hudson, 503 U.S. at 6; DeGidio v. Pung, 920 F.2d 525, 532 (8th Cir. 1990) Stenzel v. Ellis, 916 F.2d 425, 427 (8th Cir. 1990). Although the Courts do not use the term “deliberate indifference” in Eighth Amendment use-of-force cases, “intent” is re-
ing whether the force used was excessive, the court considers such factors as the need for the application of force, the relationship between the need for force and the amount of force that was used, the extent of the injury inflicted and whether the force was used to achieve a legitimate purpose or wantonly for the very purpose of causing harm. Although the “extent of injury inflicted” is a part of any Eighth Amendment force inquiry, physical “injury” is not required. In fact, in one case, the Eighth Circuit upheld a jury’s verdict of nominal damages with punitive damages in a case involving an inmate who prevailed on a claim that prison guard who handcuffed him behind his back used excessive force do to the inmate’s pre-existing shoulder injury. In that case, the jury, by virtue of the nominal damages, found no injury was caused by the use of force.


64. Id.

65. Nominal damages are permitted in prisoner cases. EIGHTH CIRCUIT MODEL JURY INSTRUCTION § 4.52 (1995). Nominal damages are awarded where the Court finds that there is no monetary value to the claim. Where nominal damages are appropriate, an award of one dollar ($1.00) is given.

66. Punitive damages are awarded to punish the defendant and to deter the defendant and others from like conduct in the future. Before an award of punitive damages is appropriate, it must first be established that the wrongdoer was “reckless” or “callously indifferent” to the victim. See EIGHTH CIRCUIT MODEL JURY INSTRUCTION § 4.53 (1995).

67. Id.

68. In Aldape, the inmate was greeted at his cellhouse by guards who conducted a surprise cell search because of rumors that he had a knife in a box containing legal materials. Aldape, 34 F.3d 619, 623-24 (8th Cir. 1994).

69. In Crowle, the inmate was under a medical order for protective eyewear to help the inmate cope with the pain associated with phobophobia. Crowle, 109 F.3d at 501. The inmate in Crowle suffered from sickle cell anemia which caused the photophobia. Id. However, in Crowle the Eighth Circuit did not believe that an Eighth Amendment violation existed, in part, because there was no aggravation of Crowle’s injury. Id. at 502. In
The Eighth Amendment places restraints on a prison official's use of force. However, courts should and do defer to prison official's determination of appropriate security precautions. Therefore, in assessing whether the force used is excessive, a court must consider the extent of the threat to the safety of staff and inmates, as reasonably perceived by "responsible" officers on the basis of the facts known to the officer "and any efforts made to temper the severity of a forceful response."

In considering the "threat to the safety of staff and inmates" it is essential that the court give wide deference to the guard on the scene; for the paramount concern is to maintain order "and discipline in an often dangerous and unruly environment." In deciding "whether to use force" or "the amount of force needed" to restore order during a prison disturbance, prison guards must take into account the real threat that unrest presents to inmates and staff in addition to the possible harm to an inmate against whom the use of force is used against. Eighth Amendment "excessive use of force" claims are similar to claims involving the "deliberate indifference" standard in that they are very fact sensitive and the standards may be applied differently by various trial courts.

VII. GENERAL CONDITIONS OF CONFINEMENT

There are several instances where an inmate can claim an Eighth Amendment violation, which does not fall neatly within "medical indifference," "failure to protect" or "excessive force" claims. There are also situations where the Eighth Amendment claim is based on a number of factors which have the cumulative effect of cruel and unusual punishment. An Eighth Amendment claim challenging the

Aldape, there was no aggravation of the shoulder injury. Aldape, 34 F.3d at 624. Crowley obviously suffered more pain and for a longer period of time than did Aldape. In Crowley, the inmate eventually was provided the protective eyewear months after the prison doctor initially ordered it. Crowley, 109 F.3d at 501. In Aldape, the inmate was only cuffed for minutes. Aldape, 34 F.3d at 621. Additionally, the guards in Aldape were ordered to perform an emergency search of the inmate's belongings because there was information that he had a dangerous weapon. Id. at 622. Clearly, the security interests were greater in Aldape than in Crowley.

89. Farmer, 114 S. Ct. at 1976.
90. Whitley, 475 U.S. at 319.
91. Id. at 321.
92. Ort v. White, 813 F.2d 318, 322 (11th Cir. 1987).
93. Whitley, 475 U.S. at 320.
95. In Rhodes v. Chapman, the Court stated that the conditions of confinement alone or in combination may deprive prisoners of the minimal civilized measures of life's necessities. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). In fact, some conditions of
general conditions of confinement must show that the responsible prison official acted with deliberate indifference. In Wilson, the court stated that cases challenging prison conditions must show that the offending conduct was “wanton.”

In its prohibition of “cruel and unusual punishment,” the Eighth Amendment places the duty on prison officials to ensure that inmates receive basic human needs, such as adequate food, clothing, shelter, medical care, reasonable safety and sleep. However, a minimal deprivation of one of those needs does not necessarily violate the Constitution. An inmate must suffer an extreme deprivation to make out a “conditions of confinement” case.

In the Eighth Circuit case of confinement may establish an Eighth Amendment violation “in combination” when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets. Rhodes, 452 U.S. at 347.

The Supreme Court, in Wilson, held that:

Whether [conduct] can be categorized as “wanton” depends upon the constraints facing the official. From that standpoint, we see no significant distinction between claims alleging inadequate medical care and those alleging inadequate “conditions of confinement.” Indeed, the medical care a prisoner receives is just as much a “condition” of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. . . . [In all of these cases], it is appropriate to apply the “deliberate indifference” standard articulated in Estelle.

The Constitution does not mandate comfortable prisons. Rhodes, 452 U.S. at 349. Neither does it permit inhumane ones, and it is well settled that the treatment a prisoner receives in prison and conditions under which he is confined are subject to scrutiny under the Eighth Amendment. Farmer, 114 S. Ct. at 1976; Helling v. McKinney, 509 U.S. 25, 31 (1993). See generally Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (applying “deliberate indifference” standard to policy of having male guards search female inmates where there was no emergency or suspicion); LaMaire v. Maass, 12 F.3d 144 (9th Cir. 1993) (applying malicious and sadistic standard to case involving discipline and security through constant illumination, restraints in showers and cell, lack of outdoor exercise and other measures). But see Coney v. Boardman, 16 F.3d 183 (7th Cir. 1994) (involving same a strip search of inmate by different sex authority).

98. Farmer, 114 S. Ct. at 1976; Helling, 509 U.S. at 33. Generally, the institution cannot deny inmates “necessities” which “include light, heat, ventilation, sanitation, clothing, and a proper diet.” See Green v. Baron, 879 F.2d 305, 309 (8th Cir. 1989); Davidson v. Scully, 914 F. Supp. 1011, 1015-18 (S.D.N.Y. 1996) (holding that prison’s refusal to provide sufficiently warm clothing for outdoor exercise was tantamount to reusing to provide outdoor exercise and would violate the Eighth Amendment); Williams v. Greifinger, 918 F. Supp. 91, 94-96 (S.D.N.Y. 1996); Gordon v. Faber, 800 F. Supp. 797, 799 (N.D. Iowa 1992).

99. Bell v. Wolfish, 441 U.S. 520, 539 n.21 (1979); Green, 879 F.2d at 309.

100. Hudson, 503 U.S. at 8. As stated previously, “only those deprivations denying the minimal civilized measures of life’s necessities are sufficiently grave to form the basis of an Eighth Amendment violation.” Wilson, 501 U.S. at 298. For instance, in
Whitnack v. Douglas County, the court addressed claims of inadequate conditions of confinement. The court held:

[I]nmates are entitled to reasonably adequate sanitation, personal hygiene, and laundry privileges, particularly over a lengthy course of time. Conditions of confinement, however, constitute cruel and unusual punishment "only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise. . .Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."

Because "deliberate indifference" is equivalent to subjective recklessness or conscious disregard of a substantial risk of harm, a prison official must actually know and disregard an excessive risk to an inmate's health or safety in order to meet the required burden of proof in a "condition of confinement" case.

An inmate or a class of inmates who brings a "conditions of confinement" case must be cautioned that they may be able to show an objectively horrific environment, but not be able to prove the "state of mind" requirement. The extent to which a warden or director of cor-

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101. 16 F.3d 954 (8th Cir. 1994).
102. Whitnack v. Douglas County, 16 F.3d 954, 955 (8th Cir. 1994).
103. Whitnack, 16 F.3d. at 957 (citing Howard v. Adison, 887 F.2d 134, 137 (8th Cir. 1989); Wilson, 501 U.S. at 304). In Bauer v. Sielaff, the United States District Court for the Eastern District of Pennsylvania held that the discomfort of lights at night does not constitute a constitutional deprivation. Bauer v. Sielaff, 372 F. Supp. 1104, 1110 (E.D. Penn. 1974). See also Williams v. Ward, 567 F. Supp. 10 (E.D.N.Y. 1982). In Williams, the court stated that the Constitution only requires that prisoners not be subjected to conditions so uninhabitable as to be shocking. Williams, 567 F. Supp. at 15.
restrictions can "pawn off" the problems associated with deplorable conditions on lack of funding remains a serious question.

In a traditional Eighth Amendment case, a plaintiff must name a specific individual, because "state actors" must act in their individual capacity to be actionable under section 1983. However, in certain cases, a plaintiff may name a municipality for conduct which can be attributable to custom. Therefore, the state should be subject to suit by inmates if it can be shown that knowledge of the inhumane conditions are known by state officials and where the legislature fails to appropriate funds to remediate the problem.

With expanding prison systems and over-population, it is inevitable that governments and municipalities will be forced to defend challenges from both the employees and the inmates. With prison-jail officials making identical claims from their perspective sides, state, county and municipal governments will be placed in an extremely awkward and difficult position defending "condition of confinement" claims.

VIII. FUTURE OUTLOOK FOR EIGHTH AMENDMENT CLAIMS

The outlook for Eighth Amendment claims is mixed. While a trend toward eliminating inmate rights exists, the increasing populations and deteriorating conditions in most of our prisons will invite lawsuits. The Supreme Court has made it very difficult for inmates to sustain an Eighth Amendment claim by design. This design, however, has an effect on more than the inmates. With budget cut backs and over-population problems, prison employees are faced with poor working conditions and an increasingly dangerous environment. If one were to look at a prison as a balloon, the courts have not enlarged the balloon, but merely set standards which allows one to blow more air into it. Sooner or later, the balloon will not be able to absorb the pressure and will burst. The issue facing the next century will be whether the courts will take action increasing the rights of inmates in Eighth Amendment claims before conditions deteriorate to such an extent that the employees working in them begin filling the courts with their "working condition" claims.

An attorney who considers undertaking a conditions case should take the time to interview union officials that represent correctional officers, as well as interview officers who have brought claims against their employer for poor working conditions, attacks by inmates, and stress related illnesses. If the inmates and guards bring an action together, it will be interesting to see how the courts will handle the standard of review.
An attorney representing prison officials, should try to insulate their clients by having their clients invite frequent inspections and form “working” committees which address “conditions of confinement” issues. It will be essential for prison officials to demonstrate that they are doing everything they can to cope with what is bound to be an over-population of inmates without adequate guard strength to manage it. If prison officials fail to keep these issues as a high priority, inmates and staff members will be able to demonstrate “deliberate indifference” and “reckless disregard for inmate health and safety” with increasing ease. If this becomes a trend, the courts, and not prison officials, will end up managing the day-to-day running of prisons.

IX. CONCLUSION

The Eighth Amendment has meant various things to various generations. The definition and terms associated with the Eighth Amendment change with the constantly changing make-up of the Supreme Court. As a result, the case law in this area should be viewed in the historical context of the Court’s composition at that particular time and understand that each generation will define its own “evolving standard of decency.”