

# Jailhouse Blues

Hybrid civil-custodial cases raise significant issues and require a broad range of skills both to litigate and to mediate successfully. **By Gene Moscovitch**

Hybrid cases that allege significant civil damages, but take place against the backdrop of a criminal arrest, investigation, or custodial confinement, raise significant issues and require a broad range of skills both to litigate and to mediate successfully. These cases generally involve either sentenced or non-sentenced prisoners who are in police or local jail custody, having been either merely charged with, or recently convicted of some criminal offense. The pleadings generally set forth specific allegations of excessive force, police misconduct, over-detention, or other custodial mistreatment. They can include charges of possible medical and/or psychiatric malpractice, bordering on constitutionally infirm "deliberate indifference" by prison security or medical personnel. The allegations routinely focus on the potentially inadequate staffing and insufficient training which are often believed to be prevalent in short term custodial facilities. When the level of care or supervision falls below acceptable standards and significant injury does occur, inmates, through counsel, can invoke not only traditional state court remedies, but also the penalty provisions of the Federal Civil Rights Act (42 USC 1983, et seq).

These cases have become popular among the plaintiffs' bar because they carry with them not only the potential



for large awards of punitive damages against individual defendants, but also the recovery of substantial statutory attorney fees for successful claimants. These cases are viewed favorably by the plaintiff's bar whenever the supplemental injuries suffered by these plaintiffs are grossly disproportionate to their original crime, as in the case of a post-arrest wrongful death or serious medical injury.

When the alleged neglect or abuse involves a newly arrested individual, or one who is awaiting trial and only in custody because of his or her inability to post bail, and hence still cloaked with

the presumption of innocence, the potential stakes get that much higher. If buttressed by the testimony of sympathetic family members and the plaintiff's own medical or police practices experts, the pain and suffering components of these cases can be extremely compelling. While jurors may have difficulty relating to such a plaintiff whose possible checkered past and present circumstances are far different than their own, many times the plaintiff's prior offenses will seem minor when weighed against the "unanticipated sentence enhancement" of a severe and unnecessary physical or psychological injury.

It is, after all, that concept of how we treat those who are arrested and incarcerated which supposedly distinguishes our civilization from those to which we, as a society, prefer not to be compared. Such are the nature of the "excessive force" cases as well, which inevitably, and perhaps not unfairly, feed heavily upon the current atmosphere of distrust for police personnel. In essence, they urge quite reasonably, that those who enforce the law also obey the law by applying no more than the reasonable amount of force truly necessary to arrest or subdue a given suspect. With the advent of the video camera and helicopter news footage, the media and the public

now have the capacity to patrol those who would patrol them. This often results in highly publicized, major verdicts or non-confidential settlements against government entities which, in turn, increase the likelihood that further cases will be pursued and litigated.

In some cases, plaintiff's police practices experts and forensic medical personnel are able to demonstrate where police agencies or jail doctors have violated their own internal procedures, pointing to incomplete medical files and/or inconsistent police reports to suggest either gross incompetence or deliberate indifference to the civil rights of the plaintiff. Not surprisingly, the prospect of litigating such constitutional issues in the Federal courts frequently brings forth some outstanding and highly committed advocates who are well suited to litigating these types of cases.

But this is not to say that the defending municipality or public agency does not have a host of significant advantages at its' own disposal when confronting these potentially volatile cases. When examined thoroughly, they form a sound basis for even the most talented of plaintiffs' counsel deciding to seek an early-mediated solution. For one thing, municipalities themselves are immune from punitive damages. While they often indemnify their employees, they are not obliged to do so, particularly if the errant acts can be shown to be outside of the scope of their employment or training. Further, all defendants in these cases can generally be presented in a sympathetic manner, either as a financially-strapped and over burdened government entity or as individuals who do a necessary and increasingly dangerous job which few of us would be willing to attempt. Add to that an ambivalent jury which knows that its verdict may reward "a criminal" with precious and scarce tax dollars better spent on public schools or hospitals, and throw in the potential for politically conservative jurors who may regard some post-arrest injuries as "righteous punishment for having been in jail or having committed crimes in the first place," and the pendulum begins to swing back sharply the other way.

The mistreated inmate or possible victim of unjustified police violence will often have a significant police record, casting grave doubt upon his credibility at trial, particularly when compared to the legions of well rehearsed officers, prison guards, and/or medical personnel who will testify without the specter of a prior arrest or conviction. The incarcerated plaintiff will likely testify before a judicial officer who may be highly sympathetic to the near impossible task facing law enforcement and jail personnel, and will need to survive such a court's rulings on defense Motions for Summary Judgment and Summary Adjudication, as well as crucial evidentiary rulings.

Fortunately, these cases often can be mediated to a successful conclusion when the balance and interplay of all of these factors is appreciated by a mediator with both civil and criminal law experience. The threat of plaintiff's counsel being able to collect anywhere from \$100,000 -

\$300,000 dollars in attorney fees if successful at trial, makes these cases very risky for a city attorney, district attorney, county counsel or deputy attorney general to try before a jury, unless given no choice. The fear of plaintiff's counsel devoting that kind of time and resources to a case which could end in a defense verdict, and hence produce no attorney fee award at all, is equally daunting. To the extent that all cases are difficult to predict as to likely jury outcome, these stand out as being particularly hard for either side to call.

On balance, both sides have everything to gain and little to lose in placing these cases at a decidedly early juncture in the hands of a seasoned mediator. The plaintiff's fear of confronting a biased jury or one overly protective of the public coffers, dictates that plaintiffs' counsel be somewhat reasonable in their pre-trial demands. The frequent lack of any significant lost wages claim in these cases, coupled with the likelihood of extreme financial need on the part of the inmate's immediate family, will temper even the most ardent of counsel. On the other hand, the possible desire of the defense to avoid needless publicity or a major adverse verdict leading to a decline in agency morale or public confidence will also make it unlikely that such cases easily escape the firm grasp of an experienced mediator without coming to some kind of pre-trial resolution.

Where are these cases settled? At the intersection of criminal and civil law where a mediator's knowledge of both disciplines is enormously helpful and highly predictive of success.



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