SPECIAL FOCUS: CIVIL RIGHTS

# Federal Jury Awards Punitive Damages Against DOC Medical Director

by Jesse Wing

On the last day of trial, Etienne Cho quette sat quietly at counsel table, as he had every day watching his case unfold before eight jurors. As they did every day, two prison guards had woken him up in Shelton at 3:30 a.m. and driven him two hours to Ta coma, where he sat in lock-up until trial resumed at 9 a.m. in the courtroom of Federal Judge Benjamin Settle. Then, the guards stood by his chair at counsel table. After watching closing arguments, Mr. Choquette heard the court instruct the jurors that when considering whether the denial of medical care he had suffered was cruel and unusual punishment in violation of the Eighth Amendment, the jurors must defer to the medical judgment of one of the defendants—the Chief Medical Officer of the Washington Department of Corrections (DOC). It was alarming. Mr. Choquette was not in court the following day, when the jury returned its verdict.

Mr. Choquette suffers from multiple sclerosis (MS), a lifelong illness resulting from lesions that strip the protective layer off a person's nerves (like the plastic surrounding

an electric wire). It causes the nerves to fire erratically in different parts of the body—often without warning. The pain it causes can be considerable. He de scribes the pain as "like your skin feels thick and kind of, you know, numb to the outside impact, but at the same time it's got like millions and millions of needles in it that are on fire." Taking the prescription drug gabapentin "doesn't make it go away, but it reduces it," and "makes it so you can feel kind of normal." The pain affects quality of life and function.

In 2014, Mr. Choquette was serving time in the Washington State Penitentiary when his nerve pain got worse. Nerve (or neuro pathic) pain feels different than other pain, and since the pain mechanism is unique, treatment of nerve pain differs as well. His neurologist had prescribed him a common prescription treatment for nerve pain called gabapentin—the generic name for a drug marketed as Neurontin. Gabapentin is not an opioid and is not addictive. When Mr. Choquette entered prison, his doctors continued to prescribe him gabapentin, which relieved his pain, and helped with another negative effect of MS: spasticity.

But the gabapentin dosage he was receiving was no longer effectively con trolling his pain. When she saw him at sick call, his physician's assistant (PA) took it seriously. She scheduled an appointment for him with an outside neurologist, who recommended an increase in the dosage of gabapentin. Then, she submitted a re quest to increase his dosage to the prison pharmacist, who circulated it via email to members of the DOC's Pharmacy and Therapeutics (P&T) Committee because the DOC's Medical Director, Steven Hammond, had listed gabapentin in the DOC's formulary as "restricted"—meaning even a dosage increase must be specially approved.

From behind his computer in Olympia, Medical Director Hammond plinked out a brief response: he couldn't see why an MS patient was receiving gabapentin at all, let alone an increase in dosage. Hammond knew nothing about Mr. Choquette. Hammond had never met him or examined him, and had not reviewed his medical records or consulted with his PA or the neurologist. Hammond was not a neurologist and did not treat MS patients. Hammond suggested that the pharmacist not only deny the request for an increase in dosage, but also that he force Mr. Choquette off of his pain medication altogether. When the pharmacist, later co-defendant Dr. Cris DuVall, asked what substitute she should approve, Hammond wrote back that no substitute was needed. Pharmacist DuVall dropped the matter and informed the treating PA to wean (or "titrate") Mr. Choquette off of gabapentin completely.

Within weeks, Mr. Choquette's nerve pain got much worse, forcing him to quit his prison job. Again his PA submitted a request, asking the P&T Committee to renew his prescription for gabapentin, explaining his increased pain and deterioration of his functionality since DOC had taken away his nerve pain medication. A different pharmacist, Michelle Southern, again said no.

Undeterred, his PA submitted the request to the department's Care Review Committee (CRC), which is supposed to review nonstandard requests to determine if they are "medically necessary." But the CRC too denied gabapentin for Mr. Choquette. The DOC then scheduled a transfer of Mr. Choquette to be examined by a different neurologist, the director of the MS Clinic at the University of Washington in Seattle. But the DOC botched the travel schedule, making him miss his appointment, and stranding him for nearly three months in a different prison, kept in isolation without his belongings, and in near constant pain while waiting for another appointment with the specialist.

When the Director of the MS Clinic examined him and conducted tests, she notified the DOC that his nerve pain was entirely consistent with the lesions of his MS, that such pain is common in MS patients, and that gabapentin is the first line and preferred treatment for such pain. She recommended that the DOC promptly put him back on gabapentin, at the higher dose proposed by the first neurologist.

After reading the specialist's report, a doctor at the DOC began treating Mr. Choquette with gabapentin again. But a couple of days later when the doctor formally presented the request once again to the CRC, chaired by Dr. Hammond, the Committee again ruled that gabapentin was not medically necessary. Mr. Choquette's medication was again taken away from him.

When informed about the Committee's decision, the second neurologist wrote that she "had no doubt the plaintiff was in pain, that there was no 'objective' test to prove his pain, and that gabapentin was the standard, first-line drug for neuropathic pain in MS patients." She wrote that gabapentin was not sought out by MS patients as a drug of abuse, and should be prescribed to Mr. Choquette. Armed with yet another opinion from a neurologist, the doctor yet again presented the request to the board, which finally determined that the gabapentin was medically necessary—five months after he was deprived of his effective pain treatment.

Mr. Choquette filed his own lawsuit, *prose*, alleging a single cause of action: cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. We took over representation against three defendants—Medical Director Hammond and Pharmacists DuVall and Southern—when the Washington Attorney General filed a motion to dismiss his lawsuit, which the Court denied.

More than forty years ago, "denial of medical care" resulting in "unnecessary and wanton infliction of pain" was held a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). A prisoner may establish an Eighth Amendment violation by showing that prison officials exhibited "deliberate indifference" to his "serious medical needs." *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015). The prisoner must show that the prison officials—which includes medical providers—" were (a) subjectively aware of the serious medical need and (b) failed to adequately respond." *Id*. (internal quotation marks, alterations, and citation omitted). When a prisoner challenges the denial of medical treatment, he must show that the denial "was medically unacceptable under the circumstances" and was made "in conscious disregard of an excessive risk to the inmate's health." *Id*. (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).

In defending against the state official's motion for summary judgment, we contended that a reasonable jury could conclude defendants did *not* make an "honest medical judgment" that "either of two alternative courses of treatment would be medically acceptable under the circumstances," but instead made the "medically unacceptable" decision to deny Mr. Choquette all effective treatment despite knowledge of his severe pain. *Jackson*, 90 F.3d at 332. The defendants had been aware of his diagnoses, his neuropathic pain, and his deterioration without treatment, and that he had previously been on gabapentin for that pain, and yet still they withheld the medication for nearly five months.

We also argued that a reasonable jury could conclude that the defendants acted with deliberate indifference by "choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior." *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992); see also Rosati, 791 F.3d at 1040 ("Rosati plausibly alleges … that prison officials recklessly disregarded an excessive risk to her health by denying SRS solely on the recommendation of a physician's assistant with no experience in transgender medicine"); *Snow v. McDaniel*, 681 F.3d 978, 988 (9th Cir. 2012) ("[A]

reasonable jury could conclude that the decision of the non-treating, non-specialist physicians to repeatedly deny the recommendations for surgery was medically unacceptable.")

Hammond, DuVall, and Southern were non-treating, non-specialist medical providers. They did not examine Choquette's medical records, reach out to his neurologist, follow or even discuss the recommendations in the DOC's own policies (called a "neuropathic pain algorithm" which acknowledged gabapentin as treatment for nerve pain), review or discuss other relevant literature on pain in multiple sclerosis, or recommend an adequate substitute treatment.

The defendants argued on summary judgment that the court must defer to their medical judgment, that their decisions were reasonable and supported by what they knew at the time, and because they believe gabapentin is a drug of abuse in prisons so they were warranted in taking a very cautious approach.

Judge Settle denied summary judgment, finding, "there is sufficient evidence to suggest that Defendants' denial of Plaintiff's multiple non-formulary requests goes beyond a disfavored medical option and instead consists of a deliberate or reckless disregard to Plaintiff's apparent neuropathic pain and need for adequate medication." And he denied qualified immunity, holding that at the time of their denial of treatment, it was well-established that depriving a prisoner of medically necessary pain medication violates the Eighth Amendment.

Defendants tried to gut Mr. Choquette's case by moving *in limine* to preclude all testimony about his emotional distress damages (the only compensatory damages he could claim). They asserted that the pain he suffered did not constitute a "personal injury" within the meaning of a 1996 law, the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e, which governs all federal prison confinement claims. Their argument was a matter of first impression in the Ninth Circuit. We relied on an Eighth Circuit opinion rejecting the government officials' argument "that § 1997e(e) re quires that the unconstitutional conduct must cause the physical injury." *McAdoo v. Martin*, No. 17-1952, 2018 WL 3733148, at *2–4 (8th Cir. Aug. 7, 2018). In McA doo, the plaintiff prisoner had "sustained a severe physical injury that meets the PLRA's requirements" resulting from one of the Defendants' "takedown maneuver" that was deemed Constitutional conduct. But since "severe pain flowed directly from that physical injury, and despite surgical intervention and physical therapy, the injury has caused some

amount of perma nent disability," the Plaintiff's claim satisfied the PLRA. *Id*. We likewise relied on a Tenth Circuit opinion, *Sealock v. Colora* do, 218 F.3d 1205 (10th Cir. 2000), which held that the official's deliberate indifference was not in causing the prisoner's heart attack but in failing to treat his serious medical needs flowing from the heart attack. In other words, the PLRA does not require a prisoner suffer a physical injury caused by an unconstitutional act. Judge Settle agreed. He held that Mr. Choquette suffered a physical injury under the PLRA for which he could seek recovery.

We were concerned about attempts by the defendants to infect the trial with provocative, unsubstantiated assertions that gabapentin was a drug of abuse in Washington prisons as a justification for denying it to Mr. Choquette as a security measure to avoid gangs, violence, and suicide. So we moved to exclude such testimony by their expert physician, their prison administrator, and other witnesses. But the Court denied our motion. And, ultimately, because our repeated objections on that point were denied at trial, nearly every defense witness got a few licks in on the topic.

And that raised a problem not confined to witness testimony. The parties tangled over optional language in a primary jury in struction known as a *Norwood* instruction, which if given usually sounds the death knell of a cruel and unusual punishment claim. Defendants asked the Court to in struct the jury "that in determining whether the defendant violated the plaintiff's rights as alleged, you should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security." In other words, they wanted the Court to instruct the jury that when deciding whether the medical providers in charge of Mr. Cho quette's care acted with deliberate indifference the jury must defer to the defendants' judgment based on prison security.

We argued that this language is merely optional, that the Ninth Circuit has declared that trial courts should only "rarely" instruct juries with this language in claims of inadequate medical care, and only when the defendants show that discipline and security were plausibly the basis for their decision to deny care—which we argued they had failed to do. The "deference instruction should not be given in the ordinary Eighth Amendment medical care case." Comment to *Ninth Circuit Model Civil Instruction* 9.27. Rather, it may be given only when "there is evidence that the challenged medical decision was made pursuant to [a] security-based policy or practice" that "addresses bonafide safety and security concerns." *Chess v. Dovey*, 790 F.3d 961, 974 (9th Cir. 2015).

At trial, Mr. Choquette testified cleanly and simply. He described his pain, his repeated attempts to secure treatment, the effectiveness of gabapentin on his nerve pain, his appreciation for his PA who tried to secure treatment for him, and his request that the defendants be held accountable for violating the law. On cross-examination, he admitted that many years before his in carceration he had occasionally usedille gal drugs. His best friend and his adoptive mother testified to his pain and emotional distress when he called them. The Director of the UW MS Clinic testified consistently with her findings and recommendations, as did DOC providers who had supported the renewal of Mr. Choquette's gabapentin treatment, some of them hedging in apparent concern for their job.

We called each of the defendants in our case-in-chief. Defendant pharmacist Dr. DuVall testified aggressively on cross-ex amination that her denial of medication was justified, touting that it was a drug of abuse and that the neurologist was merely making a recommendation that the DOC was free to ignore in its better judgment. My co-counsel Tiffany Cartwright caught Dr. DuVall relying on cribbed notes to sound knowledgeable in her field. Pharmacist Dr. Southern testified that she had been surprised that Dr. DuVall had denied the approval and that she thought that per haps he should have received it. She said she did not really know why she denied the request for medication and gave confused and conflicting accounts about whether she actually made the decision or deferred to others, whose names she could not recall. But she too said that gabapentin was a drug of abuse.

CMO Hammond testified twice, the first time in our case-in-chief. He claimed he was not responsible for Dr. DuVall's denial of medication, that pharmacists were free to discount his opinions. But he strongly stood by his opinion on which Dr. DuVall relied and the repeated denials of gabapen tin by the CRC, which he chaired and had the power to overrule. Despite the opinions of multiple neurologists to the contrary, he was still not convinced that nerve pain is a common feature of MS, that the neurolo gist's recommendations were not binding, and that he was protecting prisoners and staff from the scourge of gabapentin. And he testified that the denials of medication were an accepted form of medical treatment; observe the patient to see if he really needs the mediation. In Dr. Hammond's words, it was "to give him a break from the gabapentin in order to assess his medical baseline."

The defense's final witness was a DOC senior prison official, there to explain how drugs in prison lead to gangs, violence, and suicide. After several days of objections to testimony on this point, the Court finally—and for the first time—admonished the Attorney General to keep it brief since that ground had been trodden repeatedly. After the prison administrator repeated the defense party line, I asked him only two questions: (1) "You don't know anything about Mr. Choquette, do you?" which he admitted; and (2) "At the time Mr. Cho quette was denied treatment with gabapen tin, the DOC had not received even a sin glereport of gabapentin being abused or diverted by its prisoners, right?" which he likewise admitted. The defense rested.

The Court recessed for a couple of hours to further consider the defense's request for the *Norwood* jury instruction. When Judge Settle returned, he ruled that he would give the *Norwood* instruction for Medical Di rector Hammond but not for pharmacists Drs. DuVall and Southern. In other words, in deciding liability the jury was to de fer to Dr. Hammond's medical judgment, but not to the pharmacists' judgment. We presented a *Rules of the Road* and David Ball-style closing argument, and request ed $1,000-$2,000 per day in emotional distress damages for the 149 days that the defendants had denied Mr. Choquette his nerve pain medication. And we request ed punitive damages, available under 42 U.S.C. § 1983, for reckless disregard of federally protected rights to punish and de ter DOC officials from again denying medical treatment to Mr. Choquette or to other prisoners. Then the jury went home for the evening.

We were apprehensive when the clerk called us back to court for the verdict the following day, right after lunch. Since he was not in court, we had the pleasure of calling Mr. Choquette to tell him that the jury of his peers awarded him $549,000.

The verdict comprised $149,000 in com pensatory damages ($1,000 per day for 149 days) and $400,000 in punitive dam ages ($200,000 against Dr. Hammond, $175,000 against Dr. DuVall, and $25,000 against Dr. Southern).

A prevailing plaintiff under Section 1983 is entitled to recover his reasonable attorney fees and costs from the losing de fendants under 42 U.S.C. § 1988. But the PLRA severely limits the attorney fee rates that the defendants must pay (currently $212 per hour) and the total fees recover able are capped at 150% of the damages recovered. As if this methodology was not defense-oriented enough, the PLRA further requires that 25% of the prisoner's compensatory award offset the amount of attorney fees that the

defense owes. This approach perversely awards government officials. The greater the harm they have caused and the more the judgment, the more they are able to offset. We resolved our attorney fees and costs by agreement, and after our client agreed to a minor reduction the Government paid the judgment.

The trial was comprised largely of medical providers testifying as fact and expert witnesses about disagreements over diag noses, symptoms, medical research, medical judgment and treatment, and the elusive and complex issue of measuring pain and its cause. Nevertheless, we successfully tried the case in just four days, including jury selection and closing arguments. We had to keep the jury's interest as well. We achieved both by keeping the number of trial exhibits to the minimum essential documents, as well as conducting targeted depositions for tailored cross-examinations at trial and carefully preparing our witness es to be concise except when expounding on the harm suffered by Mr. Choquette.

In his holiday card, Mr. Choquette re ported that his nerve pain is under control, thanks to the jury.

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***Jesse Wing*** *tried this case with his law partner, Tiffany Cartwright, of MacDonald Hoague & Bayless in Seattle. Jesse and Tiffany are WSAJ EAGLEs, who litigate civil rights, em ployment, fair housing, and First Amendment claims. Jesse is also a member of WSAJ's Leg islative Steering Committee.*

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