Slouching Towards Negligence

Does *Kingsley v. Hendrickson* Lower the Standard for Denial of Medical Care Claims Brought by Pretrial Detainees?

By David Mathues

What can municipalities in these venues do to avoid facing a full-blown negligence regime?

The Supreme Court has repeatedly said that the Fourteenth Amendment is not a "font of tort law to be superimposed upon" existing state law. *See, e.g., Paul v. Davis,* 424 U.S. 693, 701 (1976). But this judicial promise sounds increasingly empty to many municipalities these days. At least four U.S. Courts of Appeal have fashioned a new standard for denial of medical care claims brought by pretrial detainees. The Second, Sixth, Seventh, and Ninth Circuits have done so by applying *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), to all claims brought by pretrial detainees. These courts insist that their new "objective reasonableness" standard derived from *Kingsley* requires plaintiffs to prove more than negligence. But particularly for medical claims, municipalities are wisely concerned that this new standard looks, feels, and quacks like negligence. What can municipalities in these venues do to avoid facing a full-blown negligence regime?

The Fifth, Eighth, Tenth, and Eleventh Circuits offer one answer. They hold that *Kingsley* applies only to use-of-force claims and that "deliberate indifference" remains the standard for denial of medical care claims by pretrial detainees. A definitive solution could come from the Supreme Court as this circuit split looks ripe for certiorari. The municipal defense bar should begin preparations for that battle now. But until that day arrives, government defense attorneys should understand the issue, advise their clients accordingly, and, in jurisdictions that have applied *Kingsley* to medical claims, highlight certain language in the appellate decisions and argue that the change in standards is relatively small.

The Road to *Kingsley*

As always, understanding the issue begins with first principles. Denial of medical care claims brought by convicted prisoners arise under the Eighth Amendment's "Cruel and Unusual Punishment" clause. So do most other common federal constitutional claims such prisoners file, including excessive force, conditions of confinement, and failure to protect from inmate-on-inmate violence. All these claims are governed by the "deliberate indifference" standard that goes back to *Estelle v. Gamble*, 429 U.S. 97 (1976). The plaintiff must prove both an objective and subjective element: 1) that he or she faced a substantial risk of harm and 2) that the prison official knew of that risk and intentionally ignored it. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). The test resembles that for criminal recklessness. *Id*. at 837. Cases repeatedly describe "deliberate indifference" as a "high hurdle" or a "demanding standard."

The standard is different when the plaintiff is a pretrial detainee. Indeed, courts have long held that a pretrial detainee's claim arises under the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment. This is because the Eighth Amendment does not apply to one who has not been convicted and cannot

David Mathues is a partner at Hervas, Condon, & Bersani PC in Itasca, Illinois, a suburb of Chicago. His practice is exclusively devoted to representing local governments at all stages of litigation. David previously worked as an Assistant State's Attorney for Cook County, a Litigation Associate for Kirkland & Ellis, and a law clerk for a federal appellate judge. David graduated from Notre Dame Law School in 2007. He speaks and writes to local bar associations on topics related to his practice several times a year, and he is a member of the DRI's Governmental Liability and Litigation Skills committees.

be punished. The essential fact, however, is that in almost all denial of medical care cases before *Kingsley*, this difference in detainee status and constitutional provisions had no practical impact. Courts occasionally paid lip service to the possibility of different standards, but denial of medical care claims by both pretrial detainees and convicted prisoners were almost always judged under the same "deliberate indifference" standard.

The "objective reasonableness" standard is incoherent in the medical context because it bears all the marks of negligence, yet the courts adopting it insist that the standard is not negligence.

That changed with *Kingsley*. *Kingsley* was not a medical case, but an excessive force case by a pretrial detainee against correction officers. A jury sided with the officers. Kingsley, 576 U.S. at 392–94. Kingsley contended the jury instructions were wrong because they required him to prove *both* that the officers used unreasonable force *and* that they acted with "reckless disregard" for his rights. Id.

A five–four majority agreed. *Id*. at 403–04. It held that the only relevant question was whether the force was objectively reasonable. In other words, the same *Graham v. Connor* standard that applied to officers on the street also applied in a jail. *Kingsley's* reasoning boiled down to three points: 1) a purely objective standard was consistent with precedent that pretrial detainees could not be punished; 2) a purely objective standard was "workable" because all law enforcement officers are familiar with *Graham*; 3) the cases relied on by the officers were irrelevant because they all dealt with convicted prisoners and arose under the Eighth Amendment. *Id*. at 398–401. On this third point, the Court underscored that pretrial detainees were entitled to more constitutional protections because they had not been convicted. *Id*. at 400–01.

The Debate Over How Broadly *Kingsley* Reaches

Kingsley did not address whether its new "objective reasonableness" standard applied outside the use-of-force context. The *en banc* Ninth Circuit was the first court of appeals to offer an answer. An eight–three majority interpreted *Kingsley* to have replaced the "deliberate indifference" with "objective reasonableness" for all claims by pretrial detainees. *Castro v. Cty of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). The Second, Sixth, and Seventh Circuits joined Castro in applying *Kingsley* broadly, and specifically to denial of medical care claims. *Darnell v. Pineiro,* 849 F.3d 17 (2d Cir. 2017), *Miranda v. Cty. of Lake,* 900 F.3d 335 (7th Cir. 2018), *Brawner v. Scott Cty, Tenn.,* 14 F.4th 585 (6th Cir. 2021). The Seventh Circuit's *Miranda* ruling illustrates the new standard applied to such claims in the wake of *Kingsley.* A plaintiff need only to prove that a defendant "acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling" the plaintiff's case and, second, that the defendant's actions were objectively unreasonable. *Miranda*, 900 F.3d at 353.

These decisions largely rest on two arguments. First, *Kingsley* used expansive language, saying that "the challenged governmental action" must be objectively reasonable, not that the "force used" must be objectively reasonable. *See, e.g., Castro*, 833 F.3d at 1069–70 (citing *Kingsley*). Second, *Kingsley's* underlying rationale was that different constitutional provisions should be interpreted differently, and pretrial detainees are entitled to more protection than convicted prisoners. *See, e.g., Miranda*, 900 F.3d at 352. This logic is not dependent on the type of claim at issue, so why limit *Kingsley* to the type of claim at issue in that case? This reasoning did not go unchallenged. *Castro* was an *en banc* decision that split 8–3. *Castro*, 833 F.3d at 1084. (Ikuta, J. dissenting, joined by Callahan and Bea, JJ.). Similarly, *Brawner* provoked a vigorous dissent, which relied heavily on the dissent in *Castro*. *Brawner*, 14 F.4th at 601–11 (Readler, J., dissenting).

The same reasoning that did not carry the day in *Castro* and *Brawner* prevailed elsewhere. The Fifth, Eight, Tenth, and Eleventh Circuits held that *Kingsley* did not apply to denial of medical care claims. *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty. Fla*., 871 F.3d 1272 (11th Cir. 2017), *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 860 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Cope v. Cogdill*, 3 F.4th 198, 207 (5th Cir. 2021) Thus, there is an even four-to-four circuit split.

Strain distilled the reasons for limiting *Kingsley* to excessive force claims as follows. First, *Kingsley* was an excessive force case, and it relied entirely on excessive force precedents. Neither the majority nor the dissent mentioned medical care claims. *Strain*, 977 F.3d at 991. Second, "excessive force requires an affirmative act, while deliberate indifference often stems from inaction." *Id*. This distinction justified applying different standards and, in particular, keeping the subjective element in the context of medical care claims. *Id*. at 990–91. Third, it is imprudent for lower courts to treat generalized language in Supreme Court decisions as conclusive on a point not at issue in the case in which that language appears. This is particularly true when such a resolution would create tension with other Supreme Court decisions, in this instance, *Farmer v. Brennan*, which rejected a purely "objective" test for denial of medical care claims. *Strain*, 977 F.3d at 993 (citing *Farmer*).

A Broad Reading of *Kingsley* Creates Problems for Municipalities

For municipalities, this is not an abstract academic debate, but a question with immediate practical consequences. Applying *Kingsley* to medical care claims creates an inherently incoherent standard. It also expands liability for municipalities, and the standard's own incoherence opens the door for an even bigger expansion of liability.

First, the "objective reasonableness" standard is incoherent in the medical context because it bears all the marks of negligence, yet the courts adopting it insist that the standard is not negligence. Recall that *Kingsley* said that "an objective standard is workable," and that most law enforcement officers are trained on an "objective reasonableness" standard. *Kingsley*, 576 U.S. at 399. This is true, but only because of the robust body of case law defining "objectively reasonable" force that begins with *Graham v. Connor.*

The problem is that there is also a substantial body of law applying "reasonableness" to medical claims. But it is not constitutional law; it is the law of *medical malpractice*. The standard is "reasonable care." Deviation from reasonable care is negligence.

Yet, as noted at the outset of this article, the Supreme Court has repeatedly said that the federal constitution is not a "font of tort law." *Paul*, 424 U.S. at 701. Every decision applying *Kingsley* to denial of medical care claims has gone out of its way to profess it is not allowing negligence-based constitutional claims. *See, e.g., Brawner*, 14 F.4th at 596; *Miranda*, 900 F.3d at 354; *Castro*, 833 F.3d at 1071. *Kingsley* itself disapproved of that outcome. *Kingsley*, 576 U.S. at 396. In short, these courts have created a standard that sounds and feels like negligence, but which they vigorously insist is not negligence. This discord is not sustainable.

This leads to the second practical reality, which is that absent strong advocacy by municipalities, this *Kingsley*-based standard will drift towards negligence. No doubt courts will continue to mouth the "negligence is not enough" disclaimer, but those words will lose their force. Indeed, case law is already pointed in this direction. For starters, *Kinglsey* and cases like *Castro* and *Miranda* begin with the premise that pretrial detainees deserve greater constitutional protection than convicted prisoners. This creates a gravitational pull towards negligence.

The way these courts illustrate the new "objective reasonableness" test should be unsettling to municipalities. For example, the Seventh Circuit's *Miranda* contrasted hypothetical doctors who accidentally mixed up the charts of different patients with the doctors in that case, who allegedly took "wait and see" approach instead of pursuing a more aggressive intervention. *Miranda*, 900 F.3d at 354. According to *Miranda*, the first scenario is mere negligence and would not lead to constitutional liability, while the second could lead to liability.

This illustration only greases the skids towards a pure negligence standard. To be sure, some medical malpractice claims arise from unknowing errors such as mixing up charts or pulling the wrong tooth. But most medical malpractice cases do not fit this pattern. Instead, a medical professional makes an intentional but misguided choice. He or she chooses one medication over another, diagnoses one disease instead of another, or as in *Miranda*, takes a conservative "wait and see" approach instead of some aggressive intervention. If taken at face value, *Miranda's* example teaches that all of these decisions will be judged solely based on objective reasonableness—in other words, negligence. That is not an appetizing prospect for municipalities who already face a high volume of denial of medical care claims arising from jails. It is also one of the reasons Judge Readler urged the Supreme Court to grant certiorari and resolve the circuit split by limiting *Kingsley* to excessive force claims. *Brawner*, 18 F.4th at 556–57 (Readler, J., dissenting from denial of rehearing en banc).

Potential Supreme Court Intervention

The Supreme Court declined Judge Readler's invitation in *Brawner*, which for technical reasons was probably a poor vehicle to address the issue. But the issue has all the marks of a successful certiorari petition. There is a deep, well-developed circuit split. The divide addresses a significant and recurring issue of federal constitutional law. Appellate judges have urged the Supreme Court to intervene.

Thus, odds are that in the next few years, the Supreme Court will address this issue. It is worth noting that in 2022, the Supreme Court "relisted" another certiorari petition which raised this issue several times, which usually indicates an interest in taking the case, but it eventually denied certiorari in June 2022. SCOUTSblog, "*Cope v. Codgil*," available at ***https://www.scotusblog.com/case-files/cases/cope-v-cogdill/*** (last visited May 15, 2023). But that case raised several distinct issues, so perhaps the justices decided that it, like *Brawner*, was not a good vehicle to resolve this circuit split.

If the Supreme Court decides to address the issue, municipal advocates should be prepared to push hard for a ruling limiting *Kingsley* to denial of medical care claims. They may find a receptive audience. The arguments for limiting *Kingsley* in that manner are strong. The current Court is less sympathetic to prisoner plaintiffs than the court which decided Kingsley. Judicial predispositions are not guarantees; all justices can, and have, issued surprise decisions, at odds with their (alleged) political preferences. But the combination of strong arguments and a receptive court should motivate attorneys to find and argue a certworthy case on this topic.

Practical Advice and Predictions

Practitioners cannot sit on their hands hoping for Supreme Court intervention. All attorneys who regularly represent municipalities and jails should follow this issue closely. Those fortunate enough to practice in circuits which have maintained the "deliberate indifference" standard should be prepared to aggressively defend that standard against plaintiffs' attorneys seeking to push a *Kingsley*-based standard.

Attorneys in circuits on the other side—specifically, the Second, Sixth, Seventh, and Ninth—should preserve the issue for appeal and seek *en banc* review in an appropriate case. Courts of appeal have changed sides in a circuit split before. These practitioners should also advise their clients that conduct which was constitutional ten years ago might be on shaky ground today. They should also work up their cases thoroughly and not merely assume they will prevail at summary judgment based on precedent which a judge may view as outdated.

Finally, practitioners should be prepared to argue that the change from "deliberate indifference" to "objective reasonableness," while real, is minor. A good comparison comes from the change in federal pleading standards following *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Experienced practitioners recall the confusion in the wake of those decisions. What did the brave new world of "plausibility" pleading look like? Some commentators at the

time decried these decisions as a return to the onerous world of fact pleading, but fifteen years of experience shows that those fears were exaggerated. *Twombly* and *Iqbal* were tweaks, not earthquakes, in pleading standards. To be sure, a subset of marginal cases that would have survived under the old test will now be dismissed. But for most cases, the result will be the same under either standard.

So, too, practitioners should argue that the shift from "deliberate indifference" to "objective reasonableness" changes the outcome for only borderline cases. They should play up the "negligence is not enough" language and emphasize that no matter how much the "objective reasonableness" language sounds like run-of-the-mill negligence, the vastly different context of jail administration requires a different interpretation of the same words. The vagueness and internal tension of the new standard gives municipal attorneys opportunity to argue that the courts could not have intended a radical change or else they would have spoken much more clearly.

It is hard to say how successful this approach will be in the long term. Supreme Court review leading to a decision confining *Kingsley* to use-of-force cases remains the preferable option. But until that happens, the best way to prevent the courts hearing pretrial detainee medical care claims from slouching further towards negligence is for attorneys defending those claims to pull with all their might in the opposite direction.