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When prisoners are released while receiving ongoing treatment, prisons are obliged to arrange for continuing treatment after release, for a period of time reasonably necessary to allow the prisoner to obtain treatment herself, to avoid the denial or interruption of treatment. 228

Prisoners who are denied adequate medical care in state or local institutions may use 42 U.S.C. § 1983 to sue prison medical care providers, including private contractors. 229 However, suits against private corporations that provide medical care to state prisoners are treated like suits against municipalities. That is, to prevail against the corporation itself, the prisoner must show that the injury was caused by a policy of the corporation. If the injury was caused by the deliberate indifference of individual employees of the corporation, those employees must be sued individually, like employees of a state, county, or city. 230 State and local prisoners may also seek damages for medical malpractice under state law. 231

Federal prisoners are in a different situation. Though they may bring “Bivens actions” for damages against prison employees, 232 the Supreme Court has held that corporations contracting with federal agencies, including the Bureau of Prisons, cannot be sued in federal court at all under the Bivens rule. 233 A federal prisoner’s only constitutional remedy would be against individual employees of the corporation who violated her rights. However, several federal courts have held that individual corporation employees cannot be sued if there is any other possible remedy, such as a state law suit. 234 Private contractors with the federal government are not subject to suit under the Federal Tort Claims Act (FTCA). 235 However, a prisoner may be able to bring suit against a private corporation under state law for medical malpractice or other torts. If the prisoner also has a valid constitutional claim against another defendant in federal court arising from the same facts, the court may permit the state law claim to be joined with the federal claim under its supplemental jurisdiction. 236

1. The Deliberate Indifference Standard

The Supreme Court has stated that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain ... proscribed by the Eighth Amendment.’” 237 Pretrial detainees’ right to medical care is protected by the Due Process Clause rather than the Eighth Amendment, but most courts have simply applied the same Eighth Amendment deliberate indifference standard under the Due Process Clause. 238 A few courts have

228 28 U.S.C. § 2671; see Ch. 8, § C.2, n.306, on this point.
229 Agyeman v. Corrections Corp. of America, 390 F.3d 1101, 1103–04 (9th Cir. 2004) (if prisoner has an FTCA claim against the United States, prisoner could also sue the corporation—presumably under state law—and ask that the claim be joined under the federal courts’ supplemental jurisdiction). Supplemental jurisdiction is discussed in Ch. 8, § E.1.
231 Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009), cert. denied, 130 S.Ct. 259 (2009); Estate of Owensby v. City of Cincinnati, 414 F.3d 596, 602–03 (6th Cir. 2005); Miller v. Calhoun County, 408 F.3d 803, 812 (6th Cir. 2005); Garrettson v. City of Madison Heights, 407 F.3d 789, 798 (6th Cir. 2005) (applying Eighth Amendment actual knowledge deliberate indifference requirement); Cuoco v. Morissetta, 222 F.3d 99, 106–07 (2d Cir. 2000) (holding that pre-trial detainees’ medical care claims invoke the Eighth Amendment deliberate indifference standard); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) (Under Eighth Amendment and Due Process Clause, “the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees.”); Salazar v. City of Chicago, 940 F.2d 235, 237–38 (7th Cir. 1991); Martin v. Board of County Commissioners of Pueblo County, 909 F.2d 402, 406 (10th Cir. 1990); Molton v. City of Cleveland, 839 F.2d 240, 242–43 (6th Cir. 1988); Boring v. Kozakiewicz, 833 F.2d 468, 471–73 (3d Cir. 1987); Hamm v. DeKalb County, 774 F.2d 1567, 1571 (11th Cir. 1985) (“Distinguishing the eighth amendment and due process standards in this area would require courts to evaluate the details of slight differences in conditions. ... That approach would result in the courts’ becoming enmeshed in the minutiae of prison operations. ... Life and health are just as precious to convicted persons as to pretrial detainees.”).
232 The Supreme Court has said only that detainees’ due process rights are “at least as great” as Eighth Amendment protections, without saying what they actually are. City of Revere v. Mass. General Hospital, 463 U.S. 239, 244, 103 S. Ct. 2979 (1983).

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tried to spell out some distinction between the medical care rights of convicts and those of pretrial detainees, but some of these distinctions do not seem to make much difference. Unless there is clear law to the contrary in your jurisdiction, you should probably assume that a detainee medical care claim will be treated like a convict's claim. State law—statutes, constitutions, or case law—may provide different standards.

As with other Eighth Amendment claims, the deliberate indifference standard requires a plaintiff to show that the defendants had actual knowledge of an objectively cruel condition (in medical cases, a serious medical need) and did not respond reasonably to the risk. Thus—bizarre as it sounds—a doctor who did not treat you properly because she didn't realize how sick you were, or what your problem was, may not be deliberately indifferent because she failed to figure it out and therefore didn't have actual knowledge of the risk. Your only claim in a case like that may be for

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Some lower courts also appear to have been no more specific than the Supreme Court. See Hartsfield v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004). The rights of pre-trial detainees are discussed more generally in Ch. 6.

The Ninth Circuit has suggested in dictum that in medical care cases, detainees might be entitled to the benefit of the standard it has held applicable to persons civilly committed, which requires committing physicians to "exercise judgment on the basis of substantive and procedural criteria that are not substantially below the standards generally accepted in the medical community." Lolli v. County of Orange, 351 F.3d 410, 415 (9th Cir. 2003) (quoting Jensen v. Lane County, 312 F.3d 1145, 1147 (9th Cir. 2002)); see Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1188 n.10 (9th Cir. 2002) (noting the difference between Fourteenth Amendment "no punishment" rule and Eighth Amendment "no cruel and unusual punishment" rule, "it is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment.

Some courts have held that denial of medical care to an arrestee who has not been arraigned is governed by a Fourth Amendment "objective reasonableness" standard. Williams v. Rodriguez, 509 F.3d 392, 403 (7th Cir. 2007); Freeze v. Young, 756 F. Supp. 699, 705–06 (W.D.N.Y. 1991). But see Neren v. Livingston Police Dept, 86 F.3d 469, 472 (5th Cir. 1996) (rejecting Freeze, holding arrestees and detainees are both subject to due process standard). In Williams v. Rodriguez, the Seventh Circuit explained that denial of medical care to an arrestee may be objectively unreasonable where the officer has notice of the arrestee's medical need, by word or observation, and where the medical need is serious, though not necessarily as serious as required by the deliberate indifference standard. The medical need is balanced against the scope of the treatment requested and the police interests in not providing medical care at that point (e.g., where there is a need for investigation at the arrest site). Williams v. Rodriguez, 509 F.3d at 403 (citing Sides v. City of Champaign, 496 F.3d 820 (7th Cir.2007)).

Two circuits have set out standards for detainees that they say are not much different from the Eighth Amendment deliberate indifference standard. The Seventh Circuit has held that the deliberate indifference standard applies to detainees' claims against correctional staff, but the due process "professional judgment" standard applies to claims against medical professionals. Chavez v. Cady, 207 F.3d 901, 905 (7th Cir. 2000). However, it has also said that this standard is "comparable" to the deliberate indifference standard and "requires essentially the same analysis." That is: "The trier of fact can conclude that the professional knew of the need from evidence that it was obvious and, further, it can be assumed that "what might not be obvious to a lay person might be obvious to a professional acting within her area of expertise." Id. (citation omitted); see Estate of Cole by Purdye v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996) (stating that deliberate indifference in a detainee case "may be inferred based upon a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment"; stating

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The Fifth Circuit has said that challenges to "general conditions, practices, rules, or restrictions of pretrial confinement" are governed by the "reasonable relationship" standard of Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861 (1979), discussed in Ch. 6, while jail officials' "episodic acts or omissions" are governed by the Eighth Amendment deliberate indifference standard. Hare v. City of Corinth, Miss., 74 F.3d 633, 643 (5th Cir. 1996) (en banc). To invoke the Wolfish analysis, a detainee must show that a challenged act or omission "implement[s] a rule or restriction or otherwise demonstrate[s] the existence of an identifiable intended condition or practice," or else that acts or omissions "were sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by other officials, to prove an intended condition or practice to which the Bell test can be meaningfully applied." Hare, 74 F.3d at 645. Even if Bell v. Wolfish is shown to apply, it doesn't seem it will make much difference under this approach: the court said that "a proper application of Bell's reasonable relationship test is functionally equivalent to a deliberate indifference inquiry." Id., 74 F.3d at 643.

See, e.g., Jorgenson v. Schiedler, 87 Or.App. 100, 741 P.2d 528, 529 (Or.App. 1987) (state constitution requires "such medical care in the form of diagnosis and treatment as is reasonably available under the circumstances of [the prisoner's] confinement and medical condition").

State law claims of malpractice or negligence may be litigated as tort claims in state court; these are discussed in § E.5 of this chapter.

Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970 (1994); see, e.g., Johnson v. Mullin, 422 F.3d 1184, 1187 (10th Cir. 2005) (warden, health services administrator, and dental assistant who were not informed that the plaintiff's dental problem was an emergency could not be found deliberately indifferent for failing to provide immediate treatment).

Toguchi v. Chung, 391 F.3d 1051, 1059–60 (9th Cir. 2004) (dismissing an expert opinion that a prison doctor disregarded a serious risk of drug interactions because the expert "lacked any insight into [the prison doctor's] subjective knowledge"); Mata v. Saiz, 427 F.3d 745, 760 (10th Cir. 2005) (a nurse who subjectively believed the plaintiff was not having a heart attack and her chest pain had been relieved could not be found deliberately indifferent); Finnegar v. Mair, 405 F.3d 694, 696–97 (8th Cir. 2005) (per curiam) (holding that dentist who allegedly failed to recognize that
medical malpractice, since a misdiagnosis or nondiagnosis resulting from failure to exercise ordinary knowledge, skill, and care does constitute malpractice.245

However, the court does not have to accept medical staff’s statements that they did not know you had a serious need if there is evidence (direct or indirect) to the contrary.246 The same is true where non-medical personnel fail to act but there is evidence that they did know you were ill or at risk.247 You don’t have to show that the defendants knew exactly what was wrong with you or what its consequences could be if it was clear you had a serious problem and the defendants disregarded it.248 The fact that a risk was obvious

El-Uri v. City of Chicago, 186 F. Supp. 2d 844, 848–49 (N.D.Ill. 2002) (police officer who brutally beat a prisoner and observed the consequences could be found deliberately indifferent: “normally, screaming in pain will do to register a complaint”).

Dominguez v. Correctional Medical Services, 555 F.3d 543, 550 (6th Cir. 2009) (holding nurse need only be shown to have known that “serious risks accompany heat-related illnesses and dehydration,” not that plaintiff could become quadriplegic as a result); Alsinza-Oritz v. LaBoy, 400 F.3d 77, 83 (1st Cir. 2005) (holding guard who knew of prisoner’s “prolonged, manifest, and agonizing pain” and did nothing to get care for him could be found deliberately indifferent); Mata v. Saiz, 427 F.3d 745, 756 (10th Cir. 2005) (nurse who did not assess a prisoner suffering severe chest pains could be found deliberately indifferent); McElhigitt v. Foley, 182 F.3d 1248, 1256 (11th Cir. 1999) (doctor who failed to diagnose plaintiff’s cancer could still be found to have actual knowledge of a substantial risk based on his “tremendous pain and illness” which the doctor observed); Hollenbaugh v. Maurer, 397 F. Supp. 2d 894, 904 (N.D.Ohio 2005) (“The plaintiff does not have to show that the defendants knew of the exact medical risk threatening Hollenbaugh”); the fact that he did not self-diagnose his heart attack or report his heart condition did not absolve defendants who observed ample evidence of his symptoms and complaints); Spencer v. Sheahan, 158 F. Supp. 2d 837, 849–50 (N.D.Ill. 2001) (doctor who knew that diabetes are at risk for foot problems and require prompt wound care to prevent long-term complications, but who waited two days before examining a patient with complaints of pain and discolored skin on foot and seven more days before referring patient to appropriate specialist, could be found deliberately indifferent where patient ultimately had partial foot amputation because of gangrene and infection); Hudak v. Miller, 28 F. Supp. 2d 827, 831 (S.D.N.Y. 1998) (“It should be noted that the knowledge which Hudak must show Dr. Miller had is not that Hudak had a brain aneurysm . . . but rather that Miller knew that Hudak had some serious medical problem which bore further investigation; plaintiff had complained for nine months of chronic headaches before receiving a CT scan).

Some decisions, in our view, take an unreasonably demanding view of who must be shown to have known what. For example, in Zentmyer v. Keidell County, Ill., 220 F.3d 805 (7th Cir. 2000), the plaintiff alleged that officers repeatedly failed to provide him with prescribed antibiotics, and as a result he suffered permanent hearing loss from an ear infection. The court held that he had failed to show that any of the defendants actually knew that he might suffer serious injury or pain from missing his medication, since he had no obvious outward symptoms and the doctors did not tell the officers that the medication had to be given regularly. Zentmyer, 220 F.3d at 811; accord, Mahan v. Plymouth County House of Corrections, 64 F.3d 14, 18 (1st Cir. 1995) (finding that failure to administer prescription medication did not constitute deliberate indifference absent evidence that prison officials knew the plaintiff would suffer serious medical consequences without medication). Under these decisions, if you are not receiving your prescribed medication from prison staff, you would have to make them aware of the harm that you could suffer from not receiving it as prescribed. We think that the only "actual knowledge" that correctional staff need to have in such a situation is that (a) medical staff

he had punctured an artery and merely sutured the area was not deliberately indifferent, given other allegations indicating that the dentist tried to exercise care); Johnson v. Quinones, 145 F.3d 164, 169 (4th Cir. 1998) (failure to diagnose pituitary tumor was not deliberate indifference since doctors did not “draw the inference” from the symptoms they observed).

See Coppage v. Mann, 906 F. Supp. 1025, 1040, 1049 (E.D.Va. 1995) (holding doctor could not be deliberately indifferent to a condition he mis-diagnosed, but could be liable for malpractice if he should have known what the problem was); see § 6:5 of this chapter for a discussion of malpractice.

See Vaughn v. Gray, 557 F.3d 904, 909 (8th Cir. 2009) (failure to respond to prisoner who vomited through the night could support finding of deliberate indifference despite defendants’ claim that they thought the prisoner was vomiting because he had ingested shampoo; “Appellants’ self-serving contention that they did not have the requisite knowledge does not provide an automatic bar to liability in light of the objective evidence to the contrary”); Scichuana v. Wells, 345 F.3d 441, 446 (6th Cir. 2003) (doctor’s claim that there was no evidence he knew a patient was present in the prison could be overcome by evidence that there was an emergency treatment request and he ignored it); Hudak v. Miller, 28 F. Supp. 2d 827, 832 (S.D.N.Y. 1998) (doctor’s self-serving statement that he believed prisoner’s headaches were caused by tension cannot defeat liability if the facts showed that the risk of a serious problem was so obvious that he must have known about it). In LeMarbe v. Wisneski, 266 F.3d 429, 440 (6th Cir. 2001), the plaintiff’s medical expert said that any general surgeon would have known immediately upon finding bile in a patient’s abdomen that there was a bile duct leak which needed to be stopped right away; the court said this evidence could show that the defendant surgeon “was aware of facts that supported an inference of a substantial risk of serious harm” and that he drew the inference and disregarded it when he failed to take action to stop the leak or refer the patient to a surgeon who could do so. But see Campbell v. Sikes, 169 F.3d 1353, 1368–73 (11th Cir. 1999) (rejecting the idea that expert testimony about what a competent doctor would know can establish what a particular defendant did know).

Estate of Carter v. City of Detroit, 408 F.3d 304, 310, 312–13 (6th Cir. 2005) (holding a defendant who knew the plaintiff was exhibiting “the classic symptoms of a heart attack” and did not arrange transportation to a hospital could be found deliberately indifferent); Clement v. Gomez, 298 F.3d 898, 905 (9th Cir. 2002) (correction staff could be found to have actual knowledge of prisoners’ need for decontamination from pepper spray where officers themselves stepped out for fresh air, prisoners were heard coughing and gagging and made repeated requests for medical attention, and the officers opened the door and brought a fan in); Chavez v. Cady, 207 F.3d 901, 906 (7th Cir. 2000) (officers were on notice of seriousness of condition of prisoner with ruptured appendix because he “did his part to let the officers know he was suffering”);
can support a finding that the defendants knew about it.\textsuperscript{269} Further, prison staff can't automatically get off the hook just by claiming that they thought you were faking or malingering. The court or jury can reject that claim if there is other evidence that they knew you were ill or at risk.\textsuperscript{270}

If defendants violate published professional standards of care or the prison's own procedures for medical care—though these do not by themselves show a constitutional violation—they may also be found to have had actual knowledge. The standards or procedures may "provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm" in the situations for which they give instructions.\textsuperscript{271}

You don't always have to show that the defendants had any knowledge of your medical condition. Deliberate indifference can be found if they had actual knowledge that there were deficiencies in the medical care system that created a risk of the kind of harm that happened to you. This approach is most likely to be useful for claims against higher level administrators or policymakers who have some ability to do something about the deficiencies.\textsuperscript{272}

The courts' main concern in medical care cases seems to be distinguishing between deliberate indifference and "mere" (as they often put it) malpractice.\textsuperscript{273} Under the deliberate indifference standard, courts will not take sides in disagreements with medical personnel's judgments or techniques.\textsuperscript{274} In general, as long as there has been an exercise of professional judgment—even a mistaken or incompetent one—the courts will hold that the Constitution has been satisfied.\textsuperscript{275}


\textsuperscript{270}See, e.g., Conn v. City of Reno, 572 F.3d 1047, 1056 (9th Cir. 2009) (police officers' statements that they did not believe an arrestee's suicide threats and gestures were serious did not entitle them to summary judgment but presented a jury question); Estate of Carter v. City of Detroit, 408 F.3d 304, 310, 313 (6th Cir. 2005) (where defendant said he didn't really believe the plaintiff was ill despite her symptoms, jury "would be entitled to discount that explanation"); Foeleker v. Outagamie County, 394 F.3d 510, 513–14 (7th Cir. 2005) (holding a jury could find that nurses who had observed the plaintiff's condition and the fact that he had defecated in his cell could be found to have known that he was going through drug withdrawal and to have done nothing about it, despite the claim of one defendant that he believed the plaintiff was "playing the system"); Hollenbaugh v. Maurer, 397 F. Supp. 2d 894, 904 (N.D.Ohio 2005) (defendants who said they believed the prisoner who died of a heart attack was drunk and faking illness could be held liable based on evidence that they heard his statements that he was not feeling well, had the flu or food poisoning, was having chest pains, and wanted to go to the hospital), aff'd, 221 Fed.Appx. 409 (6th Cir. 2007) (unpublished); Walker v. Benjamin, 293 F.3d 1030, 1039–40 (7th Cir. 2002) (claims that doctor and nurse withheld prescribed pain medication because they thought the prisoner was malingering and trying to get high prevented a jury question of deliberate indifference); see also Greene v. Daley, 414 F.3d 645, 655 (7th Cir. 2005) (absence of "objective" evidence of pain and suffering did not excuse refusal to treat it, since "self-reporting is often the only indicator a doctor has of a patient's condition.").

\textsuperscript{271}Nata v. Saiz, 427 F.3d 745, 757 (10th Cir. 2005). Even if there is no violation of policy, the policies may be evidence of the defendants' knowledge of the risks inherent in certain circumstances. Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1190–91 (9th Cir. 2002) (policies concerning mentally ill prisoners showed that policymakers understood the risk presented by lack of prompt psychiatric attention for some new admissions). Courts may also be willing to presume knowledge of risks from medical professionals' training. See Dominguez v. Correctional Medical Services, 555 F.3d 543, 550 (6th Cir. 2009) ("As a trained medical professional, a registered nurse, Fletcher was aware or should have been aware of such dangers.").

\textsuperscript{272}Alsina-Ortiz v. LaBoy, 400 F.3d 77, 81–82 (1st Cir. 2005) (holding high-level officials could be found deliberately indifferent if they "knew of a continuing pattern of culpable failures by guards or other prison staff to refer to health providers those prisoners with culpable complaints or manifest symptoms"); Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1190–91 (9th Cir. 2002) (holding that county policymakers could be held liable for policy that delayed psychiatric treatment for some new admissions when they knew that "inevitably some prisoners arrive at the jail with urgent health problems requiring hospitalization" and were "keenly aware" that mental illnesses could present urgent needs); Bass v. Wallenstein, 769 F.2d 1173, 1184–86 (7th Cir. 1985) (holding administrators could be held deliberately indifferent based on their knowledge of deficiencies in medical care system). See § F.3.a, below; see also § A.2 of this chapter concerning this point in other kinds of deliberate indifference cases, and Ch. 8, § B.4.a., for a discussion of when a supervisor can be liable.

\textsuperscript{273}The two are not mutually exclusive. A particular set of facts may add up to deliberate indifference as well as malpractice, see Hathaway v. Coughlin, 99 F.3d 550 (2d Cir. 1996), and often does. See § F.5 of this chapter for a discussion of malpractice.

\textsuperscript{274}Toguchi v. Chung, 391 F.3d 1051, 1059–60 (9th Cir. 2004); Ciarappi v. Saini, 352 F.3d 328, 331 (7th Cir. 2003); Hernandez v. Keane, 341 F.3d 137, 146–47 (2d Cir. 2003); Garvin v. Armstrong, 236 F.3d 896, 898 (7th Cir. 2001); Walker v. Peters, 233 F.3d 494, 499 (7th Cir. 2000); Varnado v. Collins, 920 F.2d 320, 321 (5th Cir. 1991); Long v. Nix, 86 F.3d 761, 766 (8th Cir. 1996); Smith v. Marcantonio, 910 F.2d 500, 502 (8th Cir. 1990). Cf. Bailey v. Gardebring, 940 F.2d 1150, 1155 (8th Cir. 1991) (failure to provide treatment is not deliberate indifference if there is no accepted form of treatment for the patient's condition).

There is an exception. Prison officials may not shop around until they get a medical opinion that suits their non-medical concerns, or intentionally rely on a medical opinion that is without adequate basis. Hamilton v. Endell, 981 F.2d 1063, 1066–67 (9th Cir. 1992). Courts have also held that when a prisoner's treating physicians recommend a course of action, and officials (even higher level medical administrators) ignore that recommendation, the result is not a mere disagreement over medical treatment but can be deliberate indifference. Johnson v. Wright, 412 F.3d 398, 406 (2d Cir. 2005).

\textsuperscript{275}See Duckworth v. Ahmad, 532 F.3d 675, 681 (7th Cir. 2008) (failure to rule out cancer immediately in light of persistent bloody urine may have been malpractice but was not deliberate indifference); Jolly v. Knudsen, 205 F.3d 1094, 1097 (8th Cir. 2000)
There are several familiar fact patterns that courts have focused on in deciding whether a case presents a legitimate medical judgment or a question of deliberate indifference: 

**Direct evidence of deliberate indifference.** Sometimes the acts or statements of prison personnel directly demonstrate an indifferent or hostile attitude toward prisoners’ medical needs.276

(p.148) (physician’s increase in seizure medication to toxic levels was not deliberate indifference because he gave a reason for doing it); McElligott v. Foley, 182 F.3d 1248, 1256–57 (11th Cir. 1999) (holding failure to diagnose prisoner’s cancer was not deliberate indifference, though failure to treat his worsening pain might be); Stewart v. Murphy, 174 F.3d 530, 553 (5th Cir. 1999); Perkins v. Kansas Dept of Corrections, 165 F.3d 803, 811 (10th Cir. 1999) (denial of protease inhibitor to prisoner with HIV upheld, since other treatment was provided); Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996); Starbeck v. Linn County Jail, 871 F. Supp. 1129, 1144–45 (N.D.Iowa 1994); Brown v. Borough of Chambersburg, 503 F.3d 274, 278 (3d Cir. 1999) (failure to diagnose broken ribs was not deliberate indifference); Givens v. Jones, 906 F.2d 1229, 1232–33 (8th Cir. 1990) (giving a prisoner medication to which he was allergic was negligence at worst); Benson v. Cadby, 761 F.2d 335, 341 (7th Cir. 1985) (prescription of wrong drug was only malpractice); Owens–El v. U.S. Attorney General, 759 F.2d 349, 350 (4th Cir. 1988) (unnecessary continuation of dangerous drug was merely negligent); Supre v. Ricketts, 792 F.2d 958, 963 (10th Cir. 1986) (decision not to give female hormones to transgender prisoner was not deliberately indifferent); Martino v. Miller, 318 F. Supp. 2d 63, 66 (W.D.N.Y. 2004) (removing one kidney and part of bladder, even though tests showed plaintiff did not have cancer, was negligence at most); Gordon v. Higgs, 716 F. Supp. 1351, 1353 (D.Nev. 1989) (failure to take an x-ray was no more than negligent); Mastroma v. Robinson, 534 F. Supp. 434, 436, 438 (E.D. 1982) (claim of failure to diagnose vertebral fracture and failure to insert drainage tube after surgery did not state an Eighth Amendment violation); see Shakka v. Smith, 71 F.3d 162, 166 (4th Cir. 1995) (removal of plaintiff’s wheelchair, done by psychologist to protect him and others, was not actionable). But see Boyce v. Alizadah, 595 F.2d 948, 952–53 (4th Cir. 1979) (giving a prisoner medication to which he was allergic could be deliberate indifference); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974) (same as Boyce).

276Greene v. Daley, 414 F.3d 645, 654 (7th Cir. 2005) (nurse told prisoner that if he continued to “hassle” the medical staff he would be “locked up”); Hughes v. Joliet Correctional Center, 931 F.2d 425, 428 (7th Cir. 1991) (medical staff told prisoner with spinal injury he was “full of bullshit”); White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990) (doctor allegedly burned the hand of an inmate who said he had losing feeling); Kersh v. Derozier, 851 F.2d 1509, 1510, 1513 (5th Cir. 1988) (the plaintiff lost sight in one eye because police and jail personnel would not let him wash something out of it); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (doctor ridiculed transgender prisoner and completely denied care); Mullen v. Smith, 738 F.2d 317, 318–19 (8th Cir. 1984) (prisoner was subjected to “ridicule and derision” in response to complaints of pain and inability to walk); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (doctor refused to try to reattach the prisoner’s severed ear and threw it away in front of him); Marcotte v. Monroe Corrections Complex, 394 F. Supp. 2d 1289, 1296 (W.D.Wash. 2005) (nurse threatened the plaintiff with “the hole” if

Denial or delay of access to treatment.277 Such conduct may include interference with access to medical personnel278 or to a hospital,279 or failure of medical personnel

he kept complaining); Nelson v. Prison Health Services, 991 F. Supp. 1452, 1464 (N.D.Tex. 1997) (nurse insisted on finishing her breakfast before responding to urgent complaint of chest pain, then accused the prisoner of “theatrics”); Phillips v. Michigan Dep’t of Corrections, 731 F. Supp. 792, 800 (W.D. Mich. 1990) (doctor directed ridicule and offensive remarks to a transgender prisoner), aff’d, 932 F.2d 969 (6th Cir. 1991); Langley v. Coughlin, 715 F. Supp. 522, 541 (S.D.N.Y. 1988) (deliberate indifference claim was supported by “displays of hostility by prison psychiatrists to their female patients . . . which sometimes led to outright refusals to treat”); Smallwood v. Renfro, 708 F. Supp. 182, 187–88 (N.D.Ill. 1989) (deliberate indifference claim was supported by evidence that a lieutenant overruled a decision to send the plaintiff to a hospital and later choked and hit the plaintiff). But see Means v. Cullen, 297 F. Supp. 2d 1148, 1154 (W.D.Wis. 2003) (mental health staff member’s comment that no one would care if the plaintiff died did not show deliberate indifference where she also repeatedly recommended that he remain under clinical observation to ensure his safety).


278Goebert v. Lee County, 510 F.3d 1312, 1327–28, 1331 (11th Cir. 2007) (holding jail captain who decided to disbelieve inmate medical complaints could be found deliberately indifferent for not getting assistance for pregnant prisoner who complained she was leaking fluid); Alsina–Ortiz v. LaBoy, 400 F.3d 77, 83 (1st Cir. 2005) (holding guard who knew of prisoner’s “prolonged, manifest, and agonizing pain” and did nothing to get care for him could be found deliberately indifferent); Scicluna v. Wells, 345 F.3d 441, 446 (6th Cir. 2003) (“Transferring a prisoner in need of urgent medical attention to a facility that the official knows is unable to provide the required treatment is conduct that would alert a reasonable person to the likelihood of personal liability”); Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (two-month failure to get prisoner with head injury to a doctor stated a claim); Fields v. City of South Houston, Texas, 922 F.2d 1183, 1192 n.10 (5th Cir. 1991) (evidence that police officers exercised wide discretion in summoning medical care for prisoners); H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1083, 1087 (11th Cir. 1986) (isolation of injured inmate and deprivation of medical attention for three days); Robinson v. Moreland, 655 F.2d 887, 889–90 (8th Cir. 1981) (weekend’s delay in treating a broken hand); Hurst v. Phelps, 579 F.2d 940, 941–42 (5th Cir. 1978) (refusal to take a prisoner to a doctor’s appointment); McGill v. Mountainside Police Dep’t 720 F. Supp. 418, 423 (D.N.J. 1989) (police officers’ failure to get medical help for arrestee who was vomiting blood and had breathing difficulties); Tomarkin v. Ward, 534 F. Supp. 1224, 1235 (S.D.N.Y. 1982) (denial of medical care in solitary confinement); Isaac v. Jones, 529 F. Supp. 175, 180 (N.D.Ill. 1981) (delay by guards in providing care).

279Estate of Carter v. City of Detroit, 408 F.3d 304, 310, 312–13 (6th Cir. 2005) (holding a defendant who knew the plaintiff was exhibiting “the classic symptoms of a heart attack” and did not arrange transportation to a hospital could be found deliberately indifferent); Boswell v. Sherburne County, 849 F.2d 1117, 1122 (10th Cir. 1988) (delay in hospitalizing a miscarriage woman); Archer v. Dutcher, 733 F.2d 14, 16–17 (2d Cir. 1984) (similar to Boswell); see Gaines v. Choctaw County Commission, 242 F. Supp. 2d 1153, 1165 (S.D.Ala. 2003) (Sheriff’s removal of prisoner from
hospital against medical advice supported a deliberate indifference claim); Hodge v. Ruperto, 739 F. Supp. 873, 879 (S.D.N.Y. 1990) (police officers could be held liable for removing an arrestee from the hospital before his X-rays could be examined and his injuries treated).

Scott v. Ambani, 575 F.3d 642 (6th Cir. 2009) (allegation that doctor refused to examine or provide pain medication to prisoner who had recently been treated for prostate cancer; had severe back and leg pain and a hard and painful testicular lump stated a deliberate indifference claim); Dominguez v. Correctional Medical Services, 555 F.3d 543, 551 (6th Cir. 2009) (holding nurse's failure to respond promptly to prisoner with symptoms of heat stroke could support a finding of deliberate indifference); Edwards v. Snyder, 478 F.3d 827, 832 (7th Cir. 2007) (holding an allegation of a doctor's gratuitous two-day delay in treating an injured stated a deliberate indifference claim regardless of the adequacy of later treatment); Spann v. Roper, 453 F.3d 1007, 1008–09 (8th Cir. 2006) (holding a nurse could be found deliberately indifferent for failing to return a prisoner in his cell for three hours though she knew he had taken an overdose of mental health medications intended for another prisoner); Johnson v. Karnes, 398 F.3d 868, 875–76 (6th Cir. 2005) (holding jail doctor's failure to schedule surgery for severed tendons despite emergency room instruction to return prisoner in three to seven days could constitute deliberate indifference); McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) (holding protracted delay in starting hepatitis C treatment stated a claim); Scicluna v. Wells, 345 F.3d 441, 446 (6th Cir. 2003) (“Knowingly waiting three weeks to examine a prisoner referred to one's care for urgent attention is conduct that a reasonable prison official . . . should have known would subject him to personal liability.”); Farrow v. West, 320 F.3d 1235, 1247–48 (11th Cir. 2003) (holding delay of 15 months in providing dentures, with three- and eight-month hiatuses in treatment, by a dentist familiar with prisoner's painful condition, raised a jury question of deliberate indifference); LeMarbe v. Wisneski, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell the patient to see one out was deliberate indifference); McElligott v. Foley, 182 F.3d 1248, 1256–57 (11th Cir. 1999) (holding repeated delays in doctor's seeing a patient with constant severe pain could constitute deliberate indifference); Millet v. Beorn, 896 F.2d 848, 853–54 (4th Cir. 1990) (nurses' failure to attend infirmary patient who lost consciousness and fell); Lancaster v. Monroe County, Ala., 116 F.3d 1419, 1426 (11th Cir. 1997) (“[A] jail official who is aware of but ignores the dangers of acute alcohol withdrawal and waits for a manifest emergency before obtaining medical care is deliberately indifferent to the inmate's constitutional rights.”); Sulton v. Wright, 265 F. Supp. 2d 292, 300 (S.D.N.Y. 2003) (four-year delay in treating torn knee ligaments supported a deliberate indifference claim); Lavender v. Lampert, 242 F. Supp. 2d 821, 848 (D. Or. 2002) (holding failure to provide continuous and effective pain-relieving medication for prisoner known to have severe chronic pain). But see Peterson v. Willie, 81 F.3d 1033, 1038 (11th Cir. 1996) (holding delay in providing the plaintiff with medication did not constitute deliberate indifference because the medication is toxic and the defendants were waiting to get his prior medical records, and because getting the medication would not have immediately changed the plaintiff's symptoms).

251 How much delay in treatment is tolerated depends on the seriousness and urgency of the medical need. Some courts have held that delay is only actionable when it results in "substantial harm," but that standard is.

Harrison v. Barkley, 219 F.3d 132, 138 (2d Cir. 2000) (prison dentist refused to fill a tooth unless the prisoner also consented to extraction of one of his few other teeth).

See, e.g., Bozeman v. Orumm, 422 F.3d 1265, 1273 (11th Cir. 2005) (holding permissible delay for a prisoner unconscious from asphyxiation is measured in a few minutes, not hours); Austin v. Johnson, 328 F.3d 204, 210 (5th Cir. 2003) (given the serious medical consequences of dehydration, waiting nearly two hours to call an ambulance for a prisoner unconscious because of dehydration supported a deliberate indifference claim); Lancaster v. Monroe County, Ala., 116 F.3d 1419, 1425 (11th Cir. 1997) (holding that "a jail official who is aware of but ignores the dangers of acute alcohol withdrawal and waits for a manifest emergency before obtaining medical care is deliberately indifferent. . . . "); Weyant v. Okst, 101 F.3d 845, 856–57 (2d Cir. 1996) (delay of hours in getting medical attention for a diabetic in insulin shock raised a question of deliberate indifference); Bass v. Lewis v. Wallenstein, 769 F.2d 1173, 1178, 1183 (7th Cir. 1985) (holding 10 to 15-minute delay in doctor's response to a patient in cardiac arrest supported liability); Patrick v. Lewis, 397 F. Supp. 2d 1134, 1142 (D. Minn. 2005) (a guard who observed a prisoner not breathing and then delayed medical response for 20 to 25 minutes while assisting another prisoner with a phone call could be found deliberately indifferent); Benjamin v. Schwartz, 299 F. Supp. 2d 196, 201 (S.D.N.Y. 2004) (where a plaintiff suffered from torn tendons, if a doctor "deliberately failed to schedule him for needed surgery for almost two years, well knowing that excessive delay could mean permanent disability, then he violated a clearly established constitutional right.")

One court has stated that an "unexplained delay of hours in treating a serious injury states a prima facie case of deliberate indifference." Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990) (four-hour delay in treating a broken foot); accord, Reed v. Dunham, 893 F.2d 285, 287 (10th Cir. 1990) (two-hour delay in treatment for stab wounds); Van Cleave v. U.S., 854 F.2d 82, 84 (5th Cir. 1988) (24-hour delay in treating injuries sustained during arrest); Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978) (22-hour delay in treating a broken arm); Calhoun v. Thomas, 360 F. Supp. 2d 1264, 1284 (M.D.Ala. 2005) (six-hour delay in treating gunshot wound); Johnson v. Summers, 411 Mass. 82, 577 N.E.2d 301, 305 (Mass. 1991) (delay of hours in taking prisoner with a broken leg to the hospital). But see Jenkins v. County of Hennepin, Minn., 557 F.3d 628, 632 (8th Cir. 1999) (day's delay in treatment of a broken jaw was not deliberate indifference); Mills v. Smith, 656 F.2d 337, 340 (8th Cir. 1981) (one and a half hour delay in hospitalizing a prisoner with a gunshot wound did not constitute deliberate indifference); Brown v. Commissioner of Cecil County Jail, 501 F. Supp. 1124, 1126–27 (D. Md. 1980) (delay of less than a week in treating gonorrhea was not deliberate indifference), aff'd 204 Fed. Appx. 979 (2d Cir. 2006) (unpublished).

met if pain and suffering are unnecessarily prolonged. Some courts have required "verifying medical evidence" to support a claim that delay has caused harm.

**Denial of access to medical personnel qualified to exercise judgment about a particular medical problem.** There are several variations on this theme. In some cases, personnel may simply lack medical qualifications or training. In others, prisoners are denied access to medical personnel with the necessary specialized expertise. Sometimes cancer surgery was successful; weight loss awaiting surgery was not substantial harm where his weight stabilized), *aff'd*, 364 F.3d 1148 (9th Cir. 2004); Smith v. Board of County Commissioners of County of Lyon, 216 F. Supp. 2d 1209, 1221–22 (D.Kan. 2002) (a month's delay in treating a spinal injury, resulting in incompetence, satisfied substantial harm requirement).

*Kikumura v. Osagie*, 161 F.3d 1269 (10th Cir. 2006); *Sealock v. Colorado*, 218 F.3d at 1210 n.5.

See *Williams v. Liefer*, 491 F.3d 710, 714–15 (7th Cir. 2007) and cases cited. Such evidence need not comprise expert testimony in all cases. *Id.*, 491 F.3d at 715–16.

*Wiliams v. Edwards*, 547 F.2d 1206, 1216–18 (5th Cir. 1977) (Constitution was violated by medical staff consisting of mostly unlicensed doctors, untrained inmates and an untrained pharmacist); *Hartman v. Correctional Medical Services, Inc.*, 960 F. Supp. 1577, 1582–83 (M.D.Fl. 1996) (medical provider could be found deliberately indifferent for permitting a person with only a master's degree and no professional licenses to have authority over mental health referrals and suicide precautions); *Casey v. Lewis*, 834 F. Supp. 1477, 1545 (D. Ariz. 1993) (making of medical judgments by security staff could constitute deliberate indifference; see § 3.4.5, below, for a discussion of qualifications of medical staff, can be liable, and § 4.4.a, below, for a discussion of mental health care.

*Hayes v. Snyder*, 546 F.3d 516, 526 (7th Cir. 2008) (refusal to refer to a specialist where doctor did not know cause of reported extreme pain made no sense and could support deliberate indifference finding); *Mata v. Saiz*, 427 F.3d 745, 756 (10th Cir. 2005) (holding nurse's failure to perform "gatekeeper" role by referring patient to a practitioner for treatment of cardiac emergency could be deliberate indifference); *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (holding refusal to refer prisoner to a specialist or order an endoscopy for two years despite intense abdominal pain could be deliberate indifference); *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (holding six-week delay in sending prisoner to a dentist, resulting in infection and loss of teeth, raised an Eighth Amendment claim); *LeMarbe v. Wisneski*, 266 F.3d 429, 440 (6th Cir. 2001) (failure to make timely referral to specialist or tell the patient to seek one out was deliberate indifference); *Oxendine v. Kaplan*, 241 F.3d 1272, 1278–79 (10th Cir. 2001) (prison doctor who reattached accidentally severed finger, which became gangrene, could be found deliberately indifferent for failing to refer prisoner to a specialist at any point; denial of access to "medical personnel capable of evaluating the need for treatment" and performing surgery one is not qualified for can be deliberate indifference); *Flemmings v. Gorczyk*, 134 F.3d 104, 109 (2d Cir. 1998) (two-month refusal to send a prisoner with "classic" symptoms of a ruptured tendon to a specialist could constitute deliberate indifference); *Parham v. Johnson*, 126 F.3d 454, 458–57 n.7 (3d Cir. 1997) (denial of access to an ear specialist supported a deliberate indifference claim); *Howell v. Evans*, 922 F.2d 712, 723 (11th Cir. 1991) (failure to provide access to a respiratory therapist could constitute deliberate indifference), *vacated as settled*, 931 F.2d 711 (11th Cir. 1991) (remand as to liability of supervisor); *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (doctor's lack of obvious qualifications to diagnose and treat mental illness supported a deliberate indifference claim); *Mandev v. Doe*, 888 F.2d 783, 789–90 (11th Cir. 1989) (damages awarded where physician's assistant failed to diagnose a broken hip, refused to order an x-ray, and prevented the prisoner from seeing a doctor); *Waldrop v. Evans*, 871 F.2d 1030, 1036 (11th Cir.) (non-psychiatrist was not competent to evaluate the significance of a prisoner's suicidal gesture; prison officials must "inform competent authorities" of medical or psychiatric needs (emphasis supplied)), *rehearing denied*, 880 F.2d 421 (11th Cir. 1989); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (failure to return patient to VA hospital for treatment for Agent Orange exposure); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704–05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order); *Matzker v. Herr*, 498 F.2d 1173, 1185 (7th Cir. 1974) (where inmate with broken teeth and an eye injury did not see a dentist or a "physician or surgeon much less an ophthalmologist," a constitutional claim was stated), *overruled on other grounds*, *Salazar v. City of Chicago*, 940 F.2d 233, 240 (7th Cir. 1991); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704–05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order could constitute deliberate indifference); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762–63 (3d Cir. 1979) (inmates with mental disorders are entitled to reasonable access to medical personnel qualified to diagnose and treat those disorders); *West v. Keeve*, 571 F.2d 158, 162 (3d Cir. 1978) (denial of access to a doctor capable of assessing the need for post-operative treatment stated a constitutional claim); *Sulton v. Wright*, 265 F. Supp. 2d 292, 300 (S.D.N.Y. 2003) (adoption of a utilization review system for specialist consultation and surgery approval that operated to "limit care as much as possible" and failure to correct tracking system so surgery had to be re-approved after transfers supported deliberate indifference claim); *Spencer v. Sheahan*, 158 F. Supp. 2d 837, 849–50 (N.D.Ill. 2001) (delay in referring diabetic with complications of a foot injury to the appropriate clinic could be found deliberately indifferent); *Tillery v. Owens*, 719 F. Supp. 1256, 1307 (W.D.Pa. 1989) (services of cardiologist and dermatologist should be provided), *aff'd*, 907 F.2d 418 (3d Cir. 1990). *Centra v. Duffield*, 545 F.3d 1234, 1239 (8th Cir. 2008) (decision to refer to a specialist is a decision about course of treatment and not an Eighth Amendment violation).

See § F.3.c. of this chapter.


*Phillips v. Roane County, Tenn.*, 534 F.3d 531, 544 (6th Cir. 2008) (doctor's grossly perfunctory examination in the face of nausea, vomiting, and chest pain could evince deliberate indifference); *Spruill v. Gillis*, 372 F.3d 218, 237 (3d Cir. 2004) (allegations
Interference with medical judgment by factors unrelated to prisoners' medical needs. These factors can include staffing so inadequate that medical staff lack the time to do their jobs, facilities and procedures that do not allow for proper diagnosis and treatment, and rules or policies restricting medical care on grounds unrelated to the prisoner's medical needs. (There have been a few

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Comstock v. McCrory, 273 F.3d 693, 709 (6th Cir. 2001) (psychologists' failure to follow up on indications of suicidality supported deliberate indifference claim); McClellan v. Folley, 182 F.3d 1248, 1256–57 (11th Cir. 1999) (holding failure to inquire into, and treat, plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could be deliberate indifference); Boyce v. Alizadu, 595 F.2d 948, 952–53 (4th Cir. 1979) (prison doctor ignored a complaint of allergy to medication).

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See West v. Atkins, 487 U.S. 42, 56 n.15, 108 S. Ct. 2250 (1988) (acknowledging that "the nonmedical functions of prison life inevitably influence the nature, timing and form of medical care provided to inmates"); McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004) (holding allegation that prisoner was "denied urgently needed treatment for a serious disease because he might be released within twelve months of starting the treatment" stated a deliberate indifference claim); Harfstein v. Colburn, 371 F.3d 454, 457 (8th Cir. 2004) (holding that withholding of a dental referral for "nonmedical reasons—Hartfield's behavioral problems" raised a factual issue as to whether deliberate indifference); Durrer v. O'Carroll, 991 F.2d 64, 68–69 (3d Cir. 1993) (holding that delay in treatment for non-medical reasons could constitute deliberate indifference); Hamilton v. Endell, 981 F.2d 1063, 1066–67 (9th Cir. 1992) (holding that prison officials' disregarding a surgeon's recommendation on non-medical grounds could constitute deliberate indifference); Cohn v. Thomas, 360 F. Supp. 2d 1264, 1284 (M.D.Ala. 2005) (delaying medical care to make an arrestee confess would support a deliberate indifference claim); Lavender v. Lampert, 248 F. Supp., 2d 821, 843 (D.D.C. 2002) (reductions in medication for chronic pain while plaintiff was in disciplinary segregation supported deliberate indifference claim); Delker v. Maass, 843 F. Supp. 1390, 1398, 1401 (D. Or. 1994).

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See §§ F.3.c of this chapter.

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Natalie v. Camden County Correctional Facility, 318 F.3d 575, 583 (3d Cir. 2003) (policy to see all new admissions within 72 hours, with no provision for prisoners with immediate medication needs, supported a deliberate indifference claim); Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1189 (9th Cir. 2002) (policy to delay medical attention on intake for prisoners who were combat-ive or uncooperative supported deliberate indifference claim on behalf of prisoner with mental illness who died for lack of medical care); Anderson v. County of Kern, 45 F.3d 1310 (9th Cir. 1995) (failure to provide a translator for medical encounters can constitute deliberate indifference); Matzker v. Herr, 748 F.2d 1142, 1147 (7th Cir. 1984) (lack of facilities, overruled on other grounds, to Salazar v. City of Chicago, 940 F.2d 233, 240 (7th Cir. 1991); Green v. Morris, 581 F.2d 669, 671, 675 (7th Cir. 1978) (failure to provide coverage for medical emergencies, failure to maintain working respirator, staff who did not know how to operate emergency equipment), aff'd, 446 U.S. 14, 100 S. Ct. 1468 (1980); Madrid v. Gomez, 889 F. Supp. 1146, 1221 (N.D.Cal. 1995) (lack of input by mental health staff concerning housing decisions even where they impact mental health supported deliberate indifference finding); Lightfoot v. Walker, 48 F. Supp. 504, 517, 527 (S.D.Ill. 1980) (inadequate system of medical records).

A number of cases have held that sick call procedures that did not permit adequate assessment of the prisoner's complaint are constitutionally inadequate. See §§ F.3.a of this chapter. Inadequate physical facilities and medical records systems have also been found to violate the Constitution. See §§ F.3.e and F.3.f of this chapter.

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This issue arises frequently in cases involving transgender prisoners. See §§ F.4.a of this chapter, n.492. See also Brock v. Wright, 315 F.3d 158, 163 (2d Cir. 2003) (holding policy forbidding treatment of keloid scars for purposes of alleviating moderate chronic pain could support deliberate indifference finding); Monmouth County Correctional Institution Inmates v. Lanzaro, 784 F.2d 326, 347 (3d Cir. 1987) (restrictions on abortion unrelated to individual treatment needs); Ancata v. Prison Health Services, Inc., 769 F.2d
situations in which courts have upheld security-based restrictions on medical treatment.\textsuperscript{299} As several courts have put it, “systemic deficiencies in staffing, facilities, or procedures [which] make unnecessary suffering inevitable” may support a finding of deliberate indifference.\textsuperscript{299}

700, 704–05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order); Johnson v. Pearson, 316 F. Supp. 2d 307, 316–19 (E.D.Va. 2004) (policy of double-celling non-smoking prisoners with smokers for administrative reasons regardless of their individual health issues violated Eighth Amendment); Sultan v. Wright, 265 F. Supp. 2d 292, 300 (S.D.N.Y. 2003) (allegations that the chief medical officer of the prison system “adopted a utilization review mechanism for specialist consultation and surgery approval that used a contracted vendor whose goal, in practice, was to limit care as much as possible” supported a deliberate indifference claim); Kenney v. Paderes, 217 F. Supp. 2d 1095, 1100 (D.Haw. 2002) (holding refusal to treat plaintiff with a particular medication that was a standard treatment for his condition could constitute deliberate indifference where there was compelling evidence of an unwritten policy against using that drug); Ramos v. O’Connell, 28 F. Supp. 2d 796, 803 (W.D.N.Y. 1998) (denial of medical and dental treatment to prisoners in medical quarantine for refusing tuberculosis test could be deliberate indifference); Casey v. Lewis, 834 F. Supp. 1477, 1545 (D.Ariz. 1993) (security staff’s overruling of medical orders); U.S. v. State of Michigan, 680 F. Supp. 928, 1002, 1043–45 (W.D. Mich. 1987) (security or transportation constraints).

Prisons sometimes fail to provide prescribed medications because they don’t routinely stock them—that is, they are not in the prison’s “formulary.” We are not aware of any decisions ruling on this practice. However, one federal court said it was “troubled” by such a claim, though it “reserve[d] for another day the issue of whether the government or a prison doctor may avoid liability for deliberate indifference by seeking shelter behind an inadequate formulary.” Gil v. Reed, 381 F.3d 649, 663 n.3 (7th Cir. 2004).

\textsuperscript{299}See Garvin v. Armstrong, 236 F.3d 896, 899 (7th Cir. 2001) (upholding policy of keeping asthma inhalers in a secure location was not deliberate indifference where it also called for producing them within four minutes). Prisons may limit the availability of narcotics and other addictive drugs because of their potential for abuse as long as they provide other treatment for prisoners’ pain and other medical problems. Lawhorn v. Duckworth, 736 F. Supp. 1501, 1505 (N.D. Ind. 1987); aff’d, 902 F.2d 37 (7th Cir. 1990) (Valumun); Wolfe v. Ferguson, 689 F. Supp. 756, 760 (S.D. Ohio 1987); see also Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 760–61 (3d Cir. 1979) (jail officials could limit methadone treatment). One court has held that female hormone treatment may be denied to male transgender prisoner because of the security problems in placing them in either male or female prisons. White v. Ferrier, 849 F.2d 322, 327 (8th Cir. 1988). See § 4.4a of this chapter for further discussion of treatment of transgender prisoners.

\textsuperscript{299}Toddaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (quoting Bishop v. Stoneman, 508 F.2d 1224, 1226 (2d Cir. 1974)); accord, Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991); DeGidio v. Pung, 920 F.2d 525, 529 (8th Cir. 1990) (holding lack of “adequate organization and control in the administration of health services” supported a finding of Eighth Amendment violation); Free v. Granger, 887 F.2d 1552, 1556 (11th Cir. 1989) (“Proof of staffing or

One non-medical ground for restricting treatment is cost, and many courts have said that care cannot be denied for that reason.\textsuperscript{299} One federal appeals court has said that the procedural deficiencies may give rise to a finding of deliberate indifference; Eng v. Smith, 849 F.2d 80, 82 (2d Cir. 1988) (applying “systemic deficiencies” principle to mental health care); Morales Feliciano v. Rossello Gonzalez, 13 F. Supp. 2d 151, 206 (D.P.R. 1998); Coleman v. Wilson, 912 F. Supp. 1282, 1316–17 (E.D.Cal. 1995); Clarkson v. Coughlin, 898 F. Supp. 1019, 1042, 1049 (S.D.N.Y. 1995) (denial of interpreters to deaf prisoners during medical encounters constitutes a “systemic pattern of inadequacy of treatment . . . which is causing class members unwarranted suffering”); Madrid v. Gomez, 889 F. Supp. 1146, 1212–14 (N.D.Cal. 1995) (citing failure to “remedy the gross and obvious deficiencies of the system”); see Davis v. Carter, 452 F.3d 686, 691–94 (7th Cir. 2006) (holding plaintiff’s deliberate indifference claim of a municipal policy of inordinate delay in providing methadone treatment was supported by evidence of an absence of policies and procedures to ensure timely treatment); Cabrols v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988) (understaffing such that psychiatric staff could only spend “minutes per month” with disturbed inmates was unconstitutional), vacated, 494 U.S. 1091 (1989), reinstated, 886 F.2d 235 (9th Cir. 1989); Marcotte v. Monroe Correctional Complex, 394 F. Supp. 2d 1289, 1298 (W.D. Wash. 2005) (failure to remedy known deficient infirmary nursing procedures and other health department citations), reconsideration denied, 2005 WL 2978651 (W.D. Wash., Nov. 7, 2005); Jackson v. First Correctional Medical Services, 380 F. Supp. 2d 387, 392 (D. Del. 2005) (allegation of “the absence of basic policies to insure that the medical orders of treating physicians are reasonably followed and that the medical orders of physicians are reasonably transmitted” amounted to alleging that the treating physicians are unable to exercise informed professional judgment, resulting in deliberate indifference); Sultan v. Wright, 265 F. Supp. 2d 292, 300 (S.D. N.Y. 2003) (holding chief medical officer’s failure to correct the failures of the medical tracking system which resulted in surgery having to be re-approved after transfer and to correct the failure of medical holds and coordination of patient work-up between prisons supported a deliberate indifference claim).

\textsuperscript{299}Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (allegation of denial for budgetary reasons of surgery for painful and disabling condition stated a deliberate indifference claim); Kostlek v. Maloney, 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (“It is not, however, permissible to deny an inmate adequate medical care because it is costly. In recognition of this, prison officials at times authorize CAT scans, dialysis, and other forms of expensive medical care required to diagnose or treat familiar forms of serious illness”); Wilson v. VanNatta, 291 F. Supp. 2d 811, 816 (N.D. Ind. 2003) (allegation that prescribed pain reliever and muscle relaxer and physical therapy were cancelled on grounds of cost states a deliberate indifference claim); Baker v. Blanchette, 186 F. Supp. 2d 100, 105 (D. Conn. 2001) (unexplained denial of colostomy closure until after the plaintiff’s release, allegedly “not because of medical decisionmaking involving the use of professional judgment, but solely because of cost,” supported a deliberate indifference claim); Kruger v. Jenne, 164 F. Supp. 2d 1330, 1334 (S.D. Fla. 2000) (allegation that medical provider refused and/or delayed treatment to save money stated a deliberate indifference claim); Taylor v. Barnett, 105 F. Supp. 2d 483, 489 & n. 2 (E.D. Va. 2000) (allegation that HIV medication was changed solely for reason of cost, without medical
“civilized minimum” of medical care “is a function both of objective need and of cost. The lower the cost, the less need has to be shown, but the need must still be shown to be substantial.” However, neither that court nor any other that we are aware of has provided any clear guidance as to where the line is drawn or what role cost may play and under what circumstances.

Failure to carry out medical orders. Such cases often involve the failure to provide prescribed medication or the failure to act on medical recommendations for surgery or for other specialized care, including


One court has held that prison officials’ failure to obey a medical order for showers and dressing changes did not constitute deliberate indifference. DesRosiers v. Moran, 949 F.2d 15, 19–20 (1st Cir. 1991). In our opinion this decision is contrary to Estelle v. Gamble’s reference, cited above, to “intentionally interfering with the treatment once prescribed” as a form of deliberate indifference.


Some courts have held that denial of or delay in prescribed medication does not violate the Eighth Amendment if the delay is short or the consequences are not serious. Mayweather v. Foti, 958 F.2d 91 (5th Cir. 1992); Martin v. New York City Dept of Corrections, 522 F. Supp. 169, 170 (S.D.N.Y. 1981); Russell v. Enser, 496 F. Supp. 320, 326–28 (D.S.C. 1979), aff’d, 624 F.2d 1095 (4th Cir. 1980); Barracan v. Levi, 452 F. Supp. 1066, 1069 (D.Del. 1978), aff’d, 612 F.2d 1306 (4th Cir. 1979); see also Harris v. Mapp, 719 F. Supp. 1317, 1324–25 (E.D.Va. 1989) (failure to provide prescribed Dilantin was merely negligent; the prisoner died), aff’d, 907 F.2d 1138 (4th Cir. 1990).

Johnson v. Lockhart, 941 F.2d 705, 706–07 (8th Cir. 1991) (10-month delay in surgery that doctor recommended be done within days); Howell v. Evans, 922 F.2d 712, 723 (11th Cir. 1991) (failure to act on a medical judgment that prisoners needed access to a respiratory therapist), vacated as settled, 931 F.2d 711 (11th Cir. 1991); Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (failure to perform surgery recommended by prison doctor).
hospitalization or other care not available in the prison. Courts in some cases have upheld security-based refusals to carry out medical orders where an alternative means of satisfying the prisoners' medical needs was provided. In addition to the situations described above, in which no genuine medical judgment was exercised, there are a number of decisions that say, in effect, that not every decision by a doctor reflects medical judgment. Some such cases involve conduct by doctors that simply makes no sense and is not explained, such as failing to respond to apparently serious complaints or refusing to carry out prescribed or recommended treatments for no apparent reason. Courts have said that the Constitution is violated "if deliberate indifference cause[s] an easier and less efficacious treatment to be consciously chosen by the doctors." \(^{386}\)

Courts have also acknowledged that extreme cases of bad judgment by medical personnel can constitute deliberate indifference. "Medical treatment that is 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness' constitutes deliberate indifference. . . . Additionally, when the need for medical treatment is obvious, medical care that is so cursory as to amount to no treatment at all may constitute deliberate indifference. . . ." \(^{389}\) Gross departures from

\(^{386}\) See § F.3.d of this chapter.

\(^{389}\) Saclaw v. Skon, 523 F.3d 330, 334–35 (8th Cir. 2001) (refusal to house plaintiff nearer the cafeteria and infirmary because plaintiff did not meet the security criteria for that housing unit was not deliberately indifferent where officials offered to provide a wheelchair or deliver meals to him); Gerber v. Sweeney, 292 F. Supp. 2d 700, 648 (E.D.Pa. 2003) (prisoner who received a special hypertension diet calling for milk and juice could be provided cheese and fruit instead per a policy banning liquids and containers in segregation unit to curb throwing of urine and feces; diet substitution was done by a diettian whose affidavit said it was nutritionally and medically adequate for the plaintiff).

\(^{390}\) Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006) ("a medical professional's erroneous treatment decision can lead to deliberate indifference liability if the decision was made in the absence of professional judgment").

\(^{391}\) Scott v. Ambani, 575 F.3d 642, 648 (6th Cir. 2009) (holding doctor's refusal to examine or provide pain medication to prisoner who had recently been treated for prostate cancer, had severe back and leg pain and a hard and painful testicular lump, could constitute deliberate indifference); Hayes v. Snyder, 546 F.3d 516, 524–26 (7th Cir. 2008) (holding doctor's actions and testimony could support an inference that he was "hostile and dismissive" to plaintiff's needs and therefore deliberately indifferent); Greeno v. Daley, 414 F.3d 645, 654 (7th Cir. 2005) (holding medical staff's "obdurate refusal" to change prisoner's treatment despite his reports that his medication was not working and his condition was worsening could constitute deliberate indifference); Farrow v. West, 320 F.3d 1235, 1247–48 (11th Cir. 2003) (holding unexplained long delay in providing dentures by a dentist familiar with prisoner's painful condition could constitute deliberate indifference); Roberson v. Bradshaw, 198 F.3d 645, 648 (8th Cir. 1999) (holding doctor who ignored patient's complaint of adverse medication reaction and made no claim it was a medical judgment could be found deliberately indifferent); McElhiney v. Foley, 182 F.3d 1248, 1256–57 (11th Cir. 1999) (holding failure to inquire further into, and treat, plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could be deliberate indifference); Hunt v. Uphoff, 199 F.3d 1220,

\(^{386}\) Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); accord, McElhiney v. Foley, 182 F.3d 1248, 1256–57 (11th Cir. 1999) (holding failure to inquire further into, and treat, plaintiff's severe pain, and repeated delays in doctor's seeing the patient, could support a finding of taking an "easier but less efficacious course of treatment"); Monmouth County Jail Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987); Maynard v. New Jersey, 719 F. Supp. 292, 295 (D.N.J. 1989) (evidence that prisoner received only palliative treatment for severe complications of AIDS raised a factual question of deliberate indifference); see also Farrow v. West, 320 F.3d 1235, 1247–48 (11th Cir. 2003) (holding delay of 15 months in providing dentures, with three- and eight-month hiatiuses in treatment, by a dentist familiar with prisoner's painful condition, raised a jury question of deliberate indifference).

\(^{392}\) Adams v. Poag, 61 F.3d 1537, 1543–44 (11th Cir. 1995); see also Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005) (a doctor's persistence in a course of treatment known to be ineffective, and his ban on providing the prisoner with pain medication or gastroscopy, supported the argument that "the repeated refusal to uncover or effectively treat his condition was a 'gratuitous cruelty'"); Collignon v. Milwaukee County, 163 F.3d 982, 989 (7th Cir. 1998) ("A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances"); Parham v. Johnson, 126 F.3d 454, 457–58 n.7 (3d Cir. 1997) (inappropriate treatment for no valid reason states a deliberate indifference claim; doctor continued medication for 114 days although the Physicians' Desk Reference says it should be used for no more than 10 days and plaintiff was experiencing adverse effects); Hughes v. Joliet Correctional Center, 931 F.2d 425, 428 (7th Cir. 1991) (evidence that medical staff treated the plaintiff "not as a patient, but as a nuisance," and "were insufficiently interested in his health to take even minimal steps to guard against the possibility that the injury was severe" could support a finding of deliberate indifference); White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990) (deliberate indifference claim was stated by "allegations that the doctor intended to inflict pain on
accepted medical standards may be evidence of deliberate indifference.\textsuperscript{302} The failure to follow professional standards, or even prison medical care protocols, may support a finding of deliberate indifference because the standards or protocols can be evidence of the practitioner's knowledge of the risk posed by particular symptoms or conditions.\textsuperscript{81} In these cases, courts give substantial weight to expert testimony criticizing the prisoner's care, rather than dismissing it as a difference of opinion among doctors.\textsuperscript{302}

prisoners without any medical justification and . . . the sheer number of specific instances in which the doctor allegedly insisted on continuing courses of treatment that the doctor knew were painful, ineffective, or entailed substantial risk of serious harm to the prisoners;); Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986) (treatment "so grossly incompetent, inadequate, or excessive as to shock the conscience" or "so inappropriate as to evidence intentional maltreatment" violates the Eighth Amendment (emphasis supplied)); Rosen v. Chang, 811 F. Supp. 754, 760–61 (D.R.I. 1993) ("Grossly incompetent and recklessly inadequate examination by a licensed physician" may constitute deliberate indifference).

\textsuperscript{303} Howell v. Evans, 922 F.2d 712, 719 (11th Cir. 1991) ("the contemporary standards and opinions of the medical profession are highly relevant in determining what constitutes deliberate indifference"); vacated as settled, 931 F.2d 711 (11th Cir. 1991); Moore v. Duffy, 255 F.3d 543, 545 (8th Cir. 2001) (it is "clearly established" that medical treatment may so deviate from the applicable standard of care as to evidence deliberate indifference; conflicting expert opinions may create a factual question as to deliberate indifference; Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990) (plaintiff should be permitted to prove that treatment "so deviated from professional standards that it amounted to deliberate indifference").

A recent decision granting a preliminary injunction to a prisoner who was declared ineligible for a liver transplant, without which he was at risk of early death, stated: "In order to prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the course of treatment the doctors chose was medically unacceptable in light of the circumstances and that they chose this course in conscious disregard of an excessive risk to plaintiff's health." Rosado v. Alameida, 349 F. Supp. 2d 1340, 1344–45 (S.D.Cal. 2004).

\textsuperscript{304} Mata v. Saiz, 427 F.3d 745, 757–58 (10th Cir. 2005); accord, Phillips v. Roane County, Tenn., 534 F.3d 531, 541, 543–44 (6th Cir. 2008).

\textsuperscript{305} Whether an instance of medical misdiagnosis resulted from deliberate indifference or negligence is a factual question requiring exploration by expert witnesses." Rogers v. Evans, 792 F.2d at 1058; Smith v. Jenkins, 919 F.2d at 94 (suggesting that the district court "may" appoint an independent expert or obtain an opinion from the prisoner's pre-incarceration doctor); Millier v. Beorn, 896 F.2d 848, 852 (4th Cir. 1990); Mandel v. Doe, 888 F.2d 783, 790 (11th Cir. 1989); Medcalf v. State of Kansas, 626 F. Supp. 1179, 1190 (D.Kan. 1986) (prisoner's expert's description of medical care as "gross negligence" raised a factual question for the jury); see § F.2.b of this chapter, nn.231–233, for a further comment on medical experts. But see Howell v. Evans, 922 F.2d at 722 (expert affidavit stating that a prison doctor "deviated from established standards" but not that his actions were "grossly inadequate" or plain wrong did not support a deliberate indifference claim), vacated as settled, 931 F.2d 711 (11th Cir. 1991).

\textsuperscript{306} See Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005) (painful gastric condition that persisted for years as treatment was denied); Parham v. Johnson, 126 F.3d 454, 457–58 n.7 (3d Cir. 1997) (ear injury resulting in severe hearing loss after maltreatment); Waldrop v. Evans, 871 F.2d 1030, 1032–36 (11th Cir.) (severe self-mutilation following psychiatric neglect), rehearing denied, 880 F.2d 421 (11th Cir. 1989); Rogers v. Evans, 792 F.2d at 1060–62 (suicide following psychiatric neglect); Carswell v. Bay County, 854 F.2d 454, 455–57 (11th Cir. 1988) (treatment of diabetic suffering catastrophic weight loss with laxatives and pain-killers); Wood v. Sunn, 865 F.2d 982, 989–90 (9th Cir. 1988) (disregard of complaints because doctors assumed the prisoner's pain was psychological; he lost the ability to urinate), vacated, 880 F.2d 1011 (9th Cir. 1989); Rosen v. Chang, 811 F. Supp. 754, 760 (D.R.I. 1990) (death from untreated appendicitis); Joseph v. Brierton, 431 F. Supp. 50, 51–52 (N.D.Ill. 1976) (fetal administration of contra-indicated medication). Some of the cases cited in n.291 of this section concerning the failure to perform tests are similar.

One court has made this point explicit, stating that "life-threatening" or "fast-developing" conditions call for closer judicial scrutiny of prison medical care. Liscio v. Warren, 901 F.2d 274, 277 (2d Cir. 1990), overruled on other grounds, Caizza v. Koreman, 581 F.3d 63 (2d Cir. 2009).

\textsuperscript{307} See, e.g., Dulany v. Carmahan, 132 F.3d 1234, 1240 (8th Cir. 1997); see also Lawhorn v. Duckworth, 736 F. Supp. 1501, 1504 (N.D.Ind. 1987) (prison doctors were considered "treating physicians and outside hospital staff's judgments were only "recommendations"), aff'd, 902 F.2d 37 (7th Cir. 1990).

\textsuperscript{308} See Gil v. Reed, 381 F.3d 694, 666 (7th Cir. 2004) ("On summary judgment, we find that prescribing on three occasions the very medication the specialist warned against . . . while simultaneously cancelling two of the three prescribed laxatives gives rise to a genuine issue of material fact about [the prison doctor's] state
serious medical needs,37 and the fact that you are properly treated on some occasions does not excuse deliberate indifference on others—though isolated lapses in an overall pattern of adequate care will generally not constitute deliberate indifference.38 A claim that officials “continuously assessed and monitored” a prisoner’s condition does not excuse the failure to provide treatment when treatment is needed.39

37 Matzker v. Herr, 748 F.2d 1142, 1147–48 (7th Cir. 1984), overruled on other grounds, Salazar v. City of Chicago, 940 F.2d 233, 240 (7th Cir. 1991) (prisoner who alleged that he suffered a broken nose, broken teeth, and an eye injury in a fight, but he only got treatment for the broken nose, stated a claim for deliberate indifference) see also Smith v. Jenkins, 919 F.2d 90, 93–94 (8th Cir. 1990) (mere proof of diagnosis by a doctor did not require dismissal of case; district court directed to review prisoner’s medical records); Lavender v. Lampert, 242 F. Supp. 2d 821, 843 (D.D.C. 2002) (the failure of medical staff to respond to ongoing complaints of chronic and debilitating pain could constitute deliberate indifference even though the prisoner regularly received medical services); Henderson v. Harris, 672 F. Supp. 1054, 1059 (N.D.Ill. 1987) (the fact that the prisoner received some care did not entitle the warden to have the case dismissed); C.F. Knap v. Johnson, 667 F. Supp. 512, 524–525 (W.D.Mich. 1987) (evidence that the prison system spends a lot of money and hires a lot of staff does not refute a deliberate indifference claim about the medical care system, a claim in part and rev’d in part on other grounds, 977 F.2d 990 (6th Cir. 1992).

38 Archer v. Dutcher, 733 F.2d 14, 16–17 (2d Cir. 1984) (pregnant woman who alleged a five-hour delay in taking her to the hospital when she began to miscarry raised a factual issue of deliberate indifference even though she received “extensive” medical attention on other occasions); Murrell v. Bennett, 615 F.2d 306, 310 n.4 (5th Cir. 1980) (the deliberate indifference standard “does not excuse one episode of gross misconduct merely because the overall pattern reflects general attentiveness”); see Comstock v. McCrery, 273 F.3d 693, 707 n.5 (6th Cir. 2001) (“Defendants’ position is, apparently, that if a prison doctor offers some treatment, no matter how insignificant, he cannot be found deliberately indifferent. This is not the law…”).

39 See Gutierrez v. Peters, 111 F.3d 1364, 1374–75 (7th Cir. 1997) (where prisoner received treatment for a cyst repeatedly over ten months with only isolated instances of delay, defendants were not deliberately indifferent; court must “examine the totality of an inmate’s medical care”); McGuinn v. Smith, 974 F.2d 1050, 1060–61 (9th Cir. 1992) (a finding that maltreatment was an “isolated exception” to the prisoner’s overall treatment militates against a finding of deliberate indifference, but a single “egregious” failure may support a deliberate indifference claim); Jones v. Evans, 544 F. Supp. 769, 775 (N.D.Ga. 1982) (a defendant may respond to a claim of denial of care or inadequate care by “establishing he was generally attentive to the prisoner’s needs”; a claim of interference with prescribed care is less subject to that defense).

40McKenna v. Wright, 386 F.3d 432, 437 (2d Cir. 2004); accord, Shomo v. City of New York, 579 F.3d 175, 184 (2d Cir. 2009) (where plaintiff alleged a policy of disregarding medical recommendations for treatment, claim was not refuted by his having frequently seen doctors who administered tests); Sulton v. Wright, 265 F. Supp. 2d 292, 300 (S.D.N.Y. 2003) (“even if an inmate receives ‘extensive’ medical care, a claim is stated if… the gravamen of his problem is not addressed”); Lavender v. Lampert, 242 F. Supp. 2d 821, 843...
Further, persisting in a course of treatment that is ineffective may itself constitute deliberate indifference.\textsuperscript{211}

Some courts have said that "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" may add up to deliberate indifference.\textsuperscript{212} But more recently, applying the "actual knowledge" courts have cautioned: "It may be, as quite a large number of cases state . . . that repeated acts of negligence are some evidence of deliberate indifference. . . . The only significance of multiple acts of negligence is that they may be evidence of the magnitude of the risk created by the defendants' conduct and the knowledge of the risk by the defendants. . . ."\textsuperscript{213}

In some cases, prison officials have denied claims of deliberate indifference by arguing that their institutions have been accredited by the National Commission on Correctional Health Care or other professional organizations. Accreditation focuses on written standards, policies, protocols, and facilities, and it may have some relevance to whether a prison's paper policies are constitutional.\textsuperscript{214} However, it says nothing about whether the actual care provided is constitutional: "constitutional policies do not necessarily ensure constitutional practices."\textsuperscript{215}

(D.O.R. 2002) (deliberate indifference claim was supported when plaintiff was examined regularly by medical staff but "there is an ongoing pattern of ignoring, and failing to timely respond to or effectively manage, plaintiff's chronic pain"); Hall v. Artuz, 954 F. Supp. 90, 94 (S.D.N.Y. 1997) ("The fact that Hall had many medical consultations concerning his knees . . . does not establish that he was not denied medically necessary physical therapy.").

\textsuperscript{211}Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005); White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990); Ruffin v. Deperio, 97 F. Supp. 2d 346, 353 (W.D.N.Y. 2000) (holding jury could find that treatment "consisted of little more than documenting [plaintiff's] worsening condition" and continuing ineffective treatment, notwithstanding frequent examinations and eventual referral to specialist).

\textsuperscript{212}Ramos v. Lunn, 639 F.2d 559, 575 (10th Cir. 1980); accord, Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991); DeGidio v. Pung, 920 F.2d 525, 533 (8th Cir. 1990) ("consistent pattern of reckless or negligent conduct" establishes deliberate indifference); Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (acts that appear negligent in isolation may constitute deliberate indifference if repeated); Diaz v. Broglino, 781 F. Supp. 566, 564 (N.D. Ind. 1991); Langley v. Coughlin, 715 F. Supp. 522, 541 (S.D.N.Y. 1988); Robert E. v. Lane, 330 F. Supp. 930, 940 (N.D.Ill. 1981) ("A pattern of similar instances presumptively indicates that prison administrators have, through their programs and procedures, created an environment in which negligence is unacceptably likely").

\textsuperscript{213}Sellers v. Henman, 41 F.3d 1100, 1102–03 (7th Cir. 1994); accord, Brooks v. Celeste, 39 F.3d 125, 128–29 (6th Cir. 1994).

\textsuperscript{214}Grayson v. Peed, 195 F.3d 692, 697 (4th Cir. 1999) (rejecting challenge to training of staff because jails were accredited by American Correctional Association and the National Commission on Correctional Health Care, whose training requirements exceed constitutional standards), \textit{rev'd on other grounds}, 243 F.3d 911 (5th Cir. 2001).

\textsuperscript{215}Ruiz v. Estelle, 37 F. Supp. 2d 855 (S.D.Tex. 1999). For further discussion of accreditation, see \textsection A.1 of this chapter, n.35.

Showing deliberate indifference does not, as a matter of law, require expert testimony, as showing medical malpractice generally does.\textsuperscript{216} However, as a practical matter, expert testimony will often be required to meet the plaintiff's burden of proof of deliberate indifference, and it is often required as a matter of law to prove that you had a serious medical need. This problem, and the courts' rarely-used power to appoint expert witnesses in prison medical care cases, are discussed elsewhere.\textsuperscript{217}

\textbf{a. Suing the Right Defendants} In pursuing a deliberate indifference claim under \textsection 1983 or \textit{Bivens}, you must think closely about exactly who was deliberately indifferent—that is, who caused the constitutional violation and can be held liable for it.\textsuperscript{218} In your complaint and other papers, you should be specific about the reasons you think a particular defendant is liable for a medical care deprivation.

Doctors and other medical personnel can be liable for the consequences of their own acts or omissions if they amount to deliberate indifference,\textsuperscript{219} but in some cases the fault may be with correctional personnel who keep you from getting to see the medical staff or interfere with treatment that has been prescribed.\textsuperscript{220} Wardens and other correctional supervisors are not deliberately indifferent when they act in reliance on the judgments of qualified medical personnel.\textsuperscript{221}

\textsuperscript{216}Hathaway v. Coughlin, 37 F.3d 63, 68 (2d Cir. 1994).

\textsuperscript{217}See Ch. 10, \textsection K.3, for a discussion of expert witnesses, including court-appointed experts.

\textsuperscript{218}The "causation" or "personal involvement" requirement applied in civil rights actions is discussed in Ch. 8, \textsection B.4.a.

\textsuperscript{219}See \textsection F.1 of this chapter.

The Supreme Court has held that physicians who are members of the federal Public Health Service are immune from individual liability, which makes the Federal Tort Claims Act (FTCA) the exclusive remedy against them for injuries resulting from the performance of medical or related functions within the scope of their employment. Hui v. Castaneda, ___ S. Ct. ___, 2010 WL 1749524 (2010).

\textsuperscript{220}Estate of Carter v. City of Detroit, 408 F.3d 304, 310, 312–13 (6th Cir. 2005) (holding a jail supervisor who knew the plaintiff was exhibiting "the classic symptoms of a heart attack" and did not arrange transportation to a hospital could be found deliberately indifferent); Alfonsin-Ortiz v. LaBoy, 400 F.3d 77, 83 (1st Cir. 2005) (holding guard who knew of prisoner's "prolonged, manifest, and agonizing pain" and did nothing to get him to see a doctor was found deliberately indifferent); Brown v. Hughes, 894 F.2d 1533, 1537–39 (11th Cir. 1989); Kelley v. McGinnis, 899 F.2d 612, 616 (7th Cir. 1990); Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986); H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1086–87 (11th Cir. 1986); Lewis v. Cooper, 771 F.2d 334, 336–37 (7th Cir. 1985); Scott v. Garcia, 370 F. Supp. 2d 1056, 1068–69 (S.D.Cal. 2005) (failure of classification committee to act on medical direction to transfer prisoner with severe stomach and digestive problems to a prison with hospital facilities); Harris v. O'Grady, 803 F. Supp. 1361, 1366 (N.D.Ill. 1992).

\textsuperscript{221}As one court observed, a warden is "not responsible for second-guessing his medical staff." Tomarkin v. Ward, 534 F. Supp. 1224, 1232 (S.D.N.Y. 1982); accord, Spruill v. Gillis, 372 F.3d 218.