

**INTEROFFICE COMMUNICATION
COUNTY OF MILWAUKEE**

DATE: August 18, 2014

TO: Theodore Lipscomb Sr., Chairman
Committee on Judiciary, Safety and General Services

FROM: Paul Bargren, Corporation Counsel *PB*
Mark A. Grady, Deputy Corporation Counsel *MAG*

SUBJECT: BHD patient care liability issues

Supervisor Staskunas and the Committee have requested information regarding the potential legal liabilities related to patient care at BHD. The Committee requested a list of significant claims, an opinion regarding the County's continuing liability following creation of the Mental Health Board and an opinion on the applicability of the Patient's Compensation Fund system to those claims.

Pending Cases and Claims

Listed below are the most significant pending suits or claims asserted against BHD related to patient care.

Estate of Steven Cole v. Milwaukee County et al,
Case No. 14-CV-740, (Eastern District of Wisconsin, federal court)

This lawsuit was just filed in federal court. The claims arise out of Cole's death while a patient at the Mental Health hospital in June of 2011. He suffered from a swallowing/eating disorder. He grabbed a sandwich out of the garbage, quickly put it in his mouth and then choked to death. The suit alleges a wide variety of violations of his civil rights and negligence causing his death.

Estate of Brandon Johnson Notice of Injury/Circumstances

A notice of injury (a precursor to a notice of claim) has been filed in this matter. Mr. Johnson was a 25 year old who was brought to the Mental Health hospital on a law enforcement emergency detention for mental commitment. Mr. Johnson died three days after admission due to a pulmonary embolism related to a fractured vertebrae. Claims of negligent care and negligent hospital practices are anticipated. A public John Doe proceeding was held related to Mr. Johnson's care, but no criminal charges were filed.

Estate of Paul Haugan Notice of Claim

A notice of claim has been filed in this matter for \$1,000,000. Mr. Haugan was a 57 year old who was brought to the Mental Health hospital on a law enforcement emergency detention for mental commitment. He died four days after admission due to breathing difficulties due to malfunctioning CPAP equipment. The claim alleges that negligent care and supervision led to his death.

Estate of Szymon Marciniak Notice of Circumstances

A notice of circumstances (a precursor to a notice of claim) has been filed in this matter. No damage amount has been asserted. The notice relates to the death of Mr. Marciniak from a drug overdose while living in a rehab apartment facility in December of 2012. The notice alleges the County negligently failed to supervise and treat him while he was receiving services in the community.

Estate of Andre Harvey Notice of Claim

A notice of claim has been filed in this matter. Mr. Harvey was brought to the emergency room of the Mental Health hospital by the Milwaukee Police Department in December of 2013. He died shortly after entering. It is alleged that his death was caused by the negligence of the police officers, the private security officers who assisted in restraining him and the staff of the hospital for failing to properly assess and treat him.

Lloyd Johnson Notice of Circumstances

A notice of circumstances has been filed in this matter (a precursor to a notice of claim). While a patient at BHD on March 18, 2012, Mr. Johnson used a pair of surgical scissors that were allegedly negligently left in his room to amputate his penis. It is alleged that BHD personnel did not properly supervise and treat Johnson.

2013 Wis Act 203, Mental Health Board

The Mental Health Board was created by this state legislation. Questions have arisen whether the potential liabilities to patients or consumers associated with past and future BHD operations are the responsibility of the County or of the Mental Health Board.

It is clear that the legislation did nothing to change the County's obligations under §895.46, Wis. Stats., and did nothing to change the County Board's authority to approve claims under §59.51(12), Wis. Stats. The first statute requires the County to defend its employees and to indemnify them from any liability incurred in the scope of their employment. It is also clear that BHD employees remain County employees. Therefore, the County is obligated to provide the same defense and indemnity to BHD employees following the creation of the Mental Health Board that it had before its creation. Thus, the County must provide attorneys to defend these employees in litigation and must pay

any judgments and settlements. Likewise, the County Board retains its authority to decide whether to settle claims arising from BHD operations.

For these reasons, we believe the County remains legally and fiscally obligated for these claims in the same manner as previously.

A corollary question has been raised concerning whether the budget related to these matters should be part of the Mental Health Board budget or the County Budget. There is no clear legal answer to this question in the statutes. On one hand, the liabilities clearly arise out of BHD daily operations and could arguably be included in the BHD budget like other operational costs. On the other hand, the fact that the County retains responsibility for, and authority over, these claims would argue that these costs should be budgeted in the County Budget. From a practical standpoint, leaving funds related to these liabilities in the County budget retains County control over the expenditure of the funds. Placing an estimated amount in the BHD budget gives control over the expenditure to the Mental Health Board. Furthermore, assuming a relatively flat total tax levy, placing the funds in the MHB budget causes a reduction in the County budget or potentially causes a reduction in services to be provided by BHD to cover these liability costs.

Chapter 655, Stats., Patient's Compensation Fund

We were asked whether BHD liabilities related to patient or consumer care could be covered by the patient's compensation fund. The ultimate conclusion is that they either cannot be or that it is not fiscally advantageous to do so.

As a governmental provider of these services, BHD has potential exposure under theories of law in addition to "standard" medical malpractice or negligence. Many of the cases and claims allege governmental violations of civil rights or similar protections, in addition to alleging negligence. The patient's compensation fund only covers medical malpractice negligence claims; it does not cover these other kinds of liabilities.

In *McEvoy v. Group Health Cooperative*, 213 Wis.2d 507 (1997), the Wisconsin Supreme Court held that a claim against an HMO for bad faith for failure to cover certain medical services was not addressed by, and therefore not preempted by, Chapter 655, the patient's compensation fund statutes. The court stated:

We conclude that ch. 655 applies only to negligent medical acts or decisions made in the course of rendering professional medical care. To hold otherwise would exceed the bounds of the chapter and would grant seeming immunity from non-ch. 655 suits to those with a medical degree.

Wisconsin courts distinguish negligent medical acts and decisions from negligence involving merely custodial or routine hospital care. Custodial or routine care "involves

care and attention to the patient's safety rendered by a hospital which is nonmedical, administrative, ministerial or routine care.” *Snyder v. Injured Patients and Families Comp. Fund*, 320 Wis.2d 259, 267–68, 768 N.W.2d 271. Therefore, a routine hospital security search is not a “medical act” because it is not a health care service and does not involve the exercise of professional medical judgment. *Id.* at 272–73; *see also Kujawski v. Arbor View Health Care Ctr.*, 139 Wis.2d 455, 462–62, (1987) (use of wheel chair restraints for nursing home patients involves routine care); *Payne v. Milwaukee Sanitarium Found., Inc.*, 82 Wis.2d 264, 272 (1977) (psychiatric patient's access to matches involves a mixed question of medical care and custodial care); *Cramer v. Theda Clark Mem'l Hosp.*, 45 Wis.2d 147, 149–50 (1969) (leaving a disoriented patient unattended and unrestrained in a hospital bed involves custodial hospital care).

Furthermore, the federal courts have held that claims of disability discrimination related to the provision of medical care do not arise from negligent provision of medical care. *Rose v. Cahee*, 727 F. Supp. 2d 728, 743 (E.D. Wis. 2010). In that case, the doctor allegedly refused to provide the inmate with medical services because she had HIV. The defendants argued that a refusal of service is a malpractice claim under Chapter 655. However, the court found Chapter 655 applies only when a health care provider engages in negligent acts or decisions and that Chapter 655 does not apply where the provider engages in discriminatory acts on the basis of a patient's disability.

Thus, Chapter 655 only covers claims of negligence involving the exercise of professional medical judgment. It does not cover claims related to non-medical negligence, such as negligent administrative or policy decisions or failures nor does it cover claims related to discrimination or civil rights violations. Because most of the suits brought against BHD include claims of forms of non-medical negligence and/or civil rights violations, obtaining coverage under Chapter 655 will not assist the County with coverage for those claims.

Furthermore, the patient's compensation fund has a “deductible” that must be handled by the health care provider of \$1,000,000 per occurrence or \$3,000,000 for all occurrences in one year, §655.23(b)(2)a. Milwaukee County has a limit of liability of \$50,000 per person for negligence, §893.80(3). Therefore, even for claims of medical negligence, there would not appear to be a fiscal advantage to being covered by Chapter 655.

cc: County Board Supervisors
Kelly Bablitch
Raisa Koltun
Scott Manske
Alexis Gassenhuber
Erica Hayden
Patricia Schroeder
Joshua Fudge
Amy Pechacek