

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Major Tillery	:	
	:	
Plaintiff,	:	Case No.
	:	
v.	:	
	:	JURY TRIAL DEMANDED
Dr. Paul Noel, Pennsylvania DOC Bureau of Health Care Services, Chief of Clinical Services,	:	
	:	ELECTRONICALLY FILED
	:	
Dr. Pandya Haresh, SCI Frackville	:	
	:	
	:	
Defendants.	:	

COMPLAINT

JURISDICTION

1. This is an action for monetary relief for violations of the Eighth and Fourteenth Amendments of the United States Constitution pursuant to 42 U.S.C. § 1983, and Pennsylvania law prohibiting medical malpractice.
2. This Court has jurisdiction pursuant to 28 U.S.C. SS 1331, 1343(a)(3) and (4), and it also has supplemental jurisdiction under 28 U.S.C. § 1367(a) to adjudicate state law claims.
3. This Court is the appropriate venue pursuant to 28 U.S.C. § 1391 (b)(2) because the events and omissions giving rise to the claims occurred in the Middle District of Pennsylvania.

PARTIES

4. Major Tillery is 67-year-old male currently incarcerated in the custody of the Pennsylvania Department of Corrections (DOC) at the State Correctional Institution (SCI) at Frackville. For years, Mr. Tillery suffered from chronic hepatitis C, a viral

infection of the liver that caused him cirrhosis, diminished platelet counts, dermatitis secondary to his hepatitis C, fatigue, and an elevated risk of hepatocellular carcinoma. He had requested treatment with anti-viral medications that would cure his disease, but the defendants denied that treatment until August 2017 following a threat of litigation, causing Mr. Tillery's condition to worsen and exposing him to an excessive risk to his future health.

5. Defendant Paul Noel, M.D. is the Chief of Clinical Services for the DOC's Bureau of Health Care Services (BHCS). In that capacity, he has oversight over the delivery of health care services to prisoners within the DOC. In addition, Dr. Noel sits on the Hepatitis C Treatment Committee that is responsible for implementing the DOC's hepatitis C protocol and makes decisions concerning which prisoners will receive hepatitis C treatment. He is sued in his individual capacity for damages. At all times relevant hereto defendant Noel acted under color of state law.
6. Defendant Doctor Pandya Haresh is the Treating Physician at SCI Frackville. He was the physician responsible for plaintiff's health care. He is sued in his individual capacity for money damages. At all times relevant hereto the defendant acted under color of state law.

STATEMENT OF FACTS

Hepatitis C

7. Hepatitis C (HCV) is a virus that infects cells of the liver. Approximately 75-85 percent of individuals infected with the HCV will develop chronic hepatitis C, causing progressive inflammation of the liver.¹

¹ Center for Disease Control and Prevention, Hepatitis C FAQ for Health Professionals, accessed at: <https://www.cdc.gov/hepatitis/hcv/hcvfaq.htm>.

8. Inflammation caused by the virus can lead to scarring, known as fibrosis, and extreme scarring, known as cirrhosis, both of which affect liver functioning.
9. One of the ways liver inflammation is measured is on the Metavir scale. On that scale FO means no fibrosis and F4 means cirrhosis
10. Chronic hepatitis C patients with any liver scarring, i.e. greater than FO are at a greater risk of rapid disease progression.
11. At least twenty percent of chronic hepatitis C patients, and perhaps as high as fifty percent, will develop cirrhosis.²
12. Approximately 11-19% of those who develop cirrhosis will go on to develop liver cancer.³
13. In the United States, hepatitis C causes more deaths than all other infectious diseases combined.⁴
14. Chronic hepatitis C often causes complications outside of the liver, including anemia and diabetes.
15. Between 20-40% of chronic hepatitis C patients have cutaneous (skin) manifestations of the disease. Among them are the relatively rare conditions of lichen planus and necrolytic acral erythema (NAE), and more common ones such as psoriasis, eczema and pruritus (persistent itching).

² Cutaneous Manifestations of Hepatitis C, Schwartz, et al., accessed at: <https://emedicine.medscape.com/article/1134161-overview#a2>.

³ *Id.*

⁴ Centers for Disease Control and Prevention. (2016, May 4). Hepatitis C Kills More Americans than Any Other Infectious Disease | CDC Online Newsroom | CDC. Accessed at: <https://www.cdc.gov/media/releases/2016/p0504-hepc-mortality.html>.

16. In or about 2013, new anti-viral drugs became available. These drugs have a 90-95% cure rate and few, if any, side effects. These drugs, two of which are Harvoni and Sovaldi, have become the standard of care in the medical community.
17. Because of the numerous benefits of early treatment, the American Association for the Study of Liver Diseases (AASLD), recommends that everyone with chronic hepatitis C be treated with those anti-viral drugs irrespective of disease stage on the Metavir scale or prognosis for progression.
18. The Center for Disease Control (CDC) has issued its own guidelines that state that the guidelines issued by the AASLD are the standard of care for the treatment of hepatitis C.

Hepatitis C and the Policy of The Pennsylvania DOC

19. The Pennsylvania Department of Corrections (DOC), through its Bureau of Health Care Services is charged with delivery of necessary medical care to prisoners under the jurisdiction of the DOC.
20. There are at least 5,400 prisoners under the jurisdiction of the DOC who have active, i.e. chronic, hepatitis C.
21. In 2013, when the current anti-viral drugs became available, the DOC, through its Bureau of Health Care Services and under the direction of defendant Noel, ceased treating all prisoners in the custody of the DOC who have active, i.e. chronic, hepatitis C.
22. This policy continued under the direction of defendant Noel throughout 2014 and most of 2015.
23. In late 2015, defendant Noel formulated and adopted a medical protocol concerning who would be treated and not treated with hepatitis C anti-viral drugs.

24. The hepatitis C protocol was added as Appendix 16-B to the Access to Health Care Procedures Manual of the Department of Corrections and is part of the DOC Policy Statement 13.1.1 entitled "Management and Administration of Health Care".
25. Under that policy, only prisoners with decompensated cirrhosis with esophageal varices were authorized to receive the anti-viral drugs.
26. When the disease has advanced to decompensated cirrhosis with esophageal varices, a person has already suffered irreversible damage to their health and is at grave risk of death.
27. In addition, before the disease has progressed to that stage, individuals suffering from it have suffered irreversible damage to their liver, decreased liver function, and are at a significantly higher risk of developing liver cancer. Many also suffer severe extra hepatic manifestations of the disease that adversely affect quality of life.
28. On August 31, 2016, the Honorable Judge Robert Mariani of the federal court for the Middle District of Pennsylvania held that the DOC's hepatitis C protocol constituted deliberate indifference to the serious medical needs of incarcerated patients with hepatitis C because it "fails to provide treatment for hepatitis C through the administration of DAA medications such as Harvoni, Sovaldi, and Viekira Pak until an inmate . . . has progressed to the stage of advanced compensated cirrhosis or early decompensated cirrhosis manifested by esophageal varices. The Court found that the interim Hepatitis C Treatment Protocol presents a conscious disregard of a known risk of advanced cirrhosis and death by esophageal hemorrhage." *Abu-Jamal v. Wetzel*, 2016 WL 4574646, *9 (M.D.Pa. 2016).

29. Despite Mr. Tillery's medical records indicating that he likely suffered from cirrhosis, he was denied hepatitis C treatment between December 2013 and August 2017.
30. The protocol delegates determinations as to who will be treated to the Hepatitis C Treatment Committee.
31. Defendant Noel as BHCS Chief of Clinical Services and member of the Hepatitis C Treatment Committee is the principal decision-maker as to who will or will not receive treatment for their hepatitis C.
32. This policy was adopted and implemented by defendant Noel even though he knew that denying treatment to prisoners who did not fall under the protocol had no medical justification, causes harm to those inmate's health and places them at risk of death.
33. Defendant Noel adopted and implemented this protocol knowing that the standard of care in the community, as articulated by the AASLD and CDC, is to treat all who have chronic hepatitis C.
34. After Judge Mariani's decision of August 31, 2016, in which he found the DOC's hepatitis C protocol unconstitutional under the Eighth Amendment but denied relief on procedural grounds, the DOC revised its protocol.
35. The current protocol has been adopted as Section 20 of the DOC's 13.2.1 Access to Health Care Procedures Manual.
36. The policy still denies treatment until a patient has developed cirrhosis.
37. Although Mr. Tillery already had cirrhosis, as well as a diminished platelet counts (a sign of disease progression), he was continuously denied treatment under this revised protocol.

38. On January 3, 2017, Judge Mariani found that the revised protocol violated the Eighth Amendment and he granted plaintiff's injunction for treatment with the direct-acting antiviral medications. *Abu-Jamal v. Wetzel*, 2017 WL 34700 (M.D.Pa. 2017).
39. This current protocol remained in effect and is administered and enforced by defendant Noel and defendant Haresh as the doctor at SCI Fayette despite a federal court holding it unconstitutional.

The Plaintiff's Medical Care

40. Major Tillery's history in the DOC, extending back more than thirty years, includes extensive documentation of his chronic hepatitis C infection.
41. Major Tillery entered DOC custody in January 1984, and since approximately 2004 he has been noted as having chronic Hepatitis C.
42. In September 2000 while at SCI Forest Mr. Tillery had emergency surgery to clear a blockage in his liver stent.
43. In 2013, while at SCI Forest, Mr. Tillery was given x-rays and a CT scan to monitor his hepatitis C and assess for cirrhosis. No treatment was provided at the time.
44. Mr. Tillery's diagnostic findings have been repeatedly noted throughout his medical records up to the present.
45. Diminished platelet counts below 140 are a sign of disease progression for hepatitis C patients.
46. It is especially important to treat hepatitis C patients with abnormally low platelet counts as they are at greater risk of medical harm, accelerated disease progression, cirrhosis, as well as anemia and resultant complications.

47. Mr. Tillery consistently had platelet counts of less than 140, indicating an abnormally low level, for more than two years prior to his receiving treatment. Despite this clear indication of a need for treatment, the DOC refused treatment pursuant to its hepatitis C protocol until threatened with litigation.
48. Mr. Tillery also suffered from atopic dermatitis prior to his treatment, a common symptom of hepatitis C.
49. DOC medical records for Mr. Tillery indicate that defendants Haresh and Noel knew that Mr. Tillery suffered from cirrhosis caused by his worsening hepatitis C infection yet they refused to authorize treatment.
50. For instance, on a hepatitis C treatment referral form dated September 1, 2016, Mr. Tillery had a Child-Pugh⁵ score of 5, indicating he had cirrhosis, as well as a HALT-C score⁶ of 66% indicating a 66% likelihood he had cirrhosis.
51. Similarly, medical progress notes from August 22, 2016 indicate that Mr. Tiller had FIB-4 score of 4.49, meaning he had at least “advanced fibrosis.”⁷
52. When the DOC issued its first hepatitis C protocol to permit treatment with the new direct-acting antiviral medications for hepatitis C, the only patients specifically authorized for treatment were those with cirrhosis and esophageal varices.
53. The reasoning given by defendant Pandya for Mr. Tillery’s non-treatment was that he was “not sick enough.”

⁵The Child-Turcotte-Pugh score is a measurement that tracks the severity of cirrhosis. According to the DOC’s hepatitis C treatment protocol, a score of 5 indicates the patient has compensated cirrhosis.

⁶ The HALT-C score measures the probability on a scale of 0-100 that a patient already has cirrhosis of the liver.

⁷ “[A] Fib-4 >3.25 would have a 97% specificity and a positive predictive value of 65% for advanced fibrosis.” <http://www.hepatitisc.uw.edu/page/clinical-calculators/fib-4>.

54. Defendant Noel explicitly denied Mr. Tillery treatment when his case was forwarded to Central Office in September 2016.
55. The DOC has not enacted policies and protocols requiring that individuals with chronic hepatitis C, such as Major Tillery, automatically receive medically necessary treatment.
56. Defendants Noel and Haresh withheld treatment to Mr. Tillery, exposing him to medical injury and risk of further harm, up to and including death. Both defendants knew that denying and delaying hepatitis C treatment exposes patients to increased risk of cirrhosis, liver failure, development of varices, circulatory problems, anemia, ascites, liver cancer, and eventually death.
57. Plaintiff was denied medically necessary treatment, to wit, the anti-viral medication, due to this policy and the actions of the defendants Haresh and Noel in formulating, implementing, and enforcing it.
58. Defendant Haresh knew the necessity of treating Mr. Tillery with the new medications because their efficacy is obvious and Mr. Tillery had already developed cirrhosis. He acquiesced in the policy of the DOC and defendant Noel in denying necessary medical care to Mr. Tillery.
59. Defendants Noel and Haresh know through correspondence from plaintiff, requests made by the plaintiff, and plaintiff's own DOC medical records, that their refusal to provide plaintiff with the anti-viral medications caused plaintiff suffering, irreversible damage to his health, and places him at increased risk of liver cancer and death.
60. Defendants knowingly played with Mr. Tillery's health and his life, putting him at risk of dying from complications of Hepatitis C.

61. Before receiving treatment, plaintiff visited the Hepatitis C clinic under the care of defendant Haresh on numerous different occasions seeking treatment for his hepatitis C.
62. Plaintiff's treatment was delayed without medical reason even though his records indicated that Mr. Tillery had hepatitis C and cirrhosis and as such was eligible for treatment as a matter of DOC's policy, nonetheless he was denied treatment.
63. Plaintiff's treatment occurred only after counsel sent a letter to defendant Noel via counsel stating the intent to obtain an injunction for plaintiff's treatment.
64. The DOC's previous refusals to treat plaintiff has caused plaintiff to have ongoing and irreversible health problems.
65. Plaintiff has increased liver damage and worsened cirrhosis.
66. Plaintiff has developed a rash, a common extrahepatic manifestation of hepatitis C.
67. The decline of plaintiff's health has caused him pain and suffering.
68. Mr. Tillery is now at a much higher risk of developing liver cancer due his treatment being delayed for more than two years without medical justification, allowing the disease to progress, placing him at a higher risk for developing hepatocellular carcinoma.
69. Plaintiff will have to live with the risks associated with decreased liver function and the risk of liver cancer for the rest of his life. All of these injuries and risks were made substantially worse by the defendants' refusal to treat him for years despite his qualifying for treatment under the standard of care for hepatitis C treatment.
70. Defendants Haresh and Noel demonstrated intentional disregard to Mr. Tillery's current and future health by allowing his hepatitis C infection to progress and worsen despite a known, safe, and effective cure being available. Defendants have exposed Mr. Tillery to an increased risk of liver cancer and mortality.

71. In fact, according to official DOC death records obtained via a Right-to-Know request approximately 40 prisoners died in DOC custody in 2015 and 2016 from hepatitis C, internal hemorrhage caused by esophageal varices, end-stage liver disease, or liver cancer.
72. Hepatitis C is the leading cause of both end-stage liver disease and liver cancer.
73. These deaths occurred at a time when the DOC was providing no treatment for hepatitis C to anybody, or else denying it to such an extent that people were left to die from a curable illness.
74. Mr. Tillery suffered permanent damage to his health and his life was put in danger by the defendants' failure to provide medically necessary hepatitis C treatment.
75. As the direct, proximate, and factual result of the conduct of the defendants, the Plaintiff, has suffered the following damages:
 - a. Plaintiff has suffered physically and mentally by being forced to endure a curable condition;
 - b. plaintiff has fear of cancer and shortened life expectancy;
 - c. plaintiff's health may be permanently impaired and he has increased risk of terminal cancer;
 - d. he has unnecessarily endured great pain, suffering, inconvenience, embarrassment, mental anguish, emotional and psychological trauma;
 - e. he may be required in the future to incur expenses for medical treatment and care, medical supplies, medicines and other attendant services;
 - f. he may sustain a loss in earning capacity;
 - g. his general health, strength and vitality have been impaired;
 - h. he has been and may in the future be unable to enjoy the various pleasures of life;

- i. he has in the past, and may continue in the future, to experience severe pain and suffering; and
- j. he has been required, and may continue in the future, to treat with various medical providers, physicians, surgeons and physical therapists.

CAUSES OF ACTION

Count I — Deprivation of Eighth Amendment Right to Medical Care for Hepatitis C

(Against defendants Noel and Dr. Haresh in their individual capacities for monetary relief.)

76. Plaintiff re-alleges paragraphs 1-75 as if fully stated herein.

77. Defendants Noel and Haresh at SCI Frackville violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment through their deliberate indifference to his chronic hepatitis C. Through enactment and enforcement of a hepatitis C protocol that denied medically necessary treatment to plaintiff These defendants failed to treat his chronic hepatitis C for more than three years, exposing plaintiff to an excessive risk and harm to his health, causing Mr. Tillery serious injuries, pain, suffering, and risk of death. Plaintiff's injuries and damages were a direct and proximate result of the acts and omissions of defendants in the following ways:

- a. In failing to adopt, maintain or follow policies or practices with regard to diagnosing, assessing, treating or providing for the medical care of incarcerated people in DOC custody;
- b. systemically, regularly and continuously delaying the proper treatment of Plaintiff's condition;
- c. in failing to properly follow up with Plaintiff in light of his repeated medical requests, symptoms and complaints;

- d. in failing to give significance to the findings and/or diagnoses involved in Plaintiff's care and treatment;

Count II – Medical Malpractice for failure to treat Plaintiff's hepatitis C

78. Plaintiff re-alleges paragraphs 1-75 as if fully stated herein.
79. Defendants Noel and Haresh were negligent in their handling of Plaintiff's condition as described above and failed to provide medical care in accordance with the applicable standard of care within the medical profession.
80. Defendants Noel and Haresh were negligent in assisting the DOC to develop and implement a policy of treatment at odds with the reasonable standard of medical care in the community.
81. Plaintiff's injuries, including decreased liver function, anxiety, depression, risk of cancer, the conditions listed above and other symptoms and conditions were directly, proximately and factually caused by the negligence of Defendant's in the manner described above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court grant the following relief:

- A. Award compensatory and punitive damages;
- B. Award attorneys' fees, litigation expenses and costs.
- C. Any further relief as the Court may deem proper.

Respectfully submitted,

/s/ Bret D. Grote
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